# In the Supreme Court of the United States

OCTOBER TERM, 1978

**No. 76-1309**

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Brief for Respondent

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## Brief for Respondent

### QUESTION PRESENTED

Whether the courts below correctly concluded that evidence acquired by electronic eavesdropping and monitoring in violation of investigative procedures promulgated by a federal administrative agency was seized in violation of the United States Constitution and so may properly be excluded from consideration in a criminal case.

### STATUTORY AND OTHER PROVISIONS INVOLVED

The Government's presentation of the administrative regulations directly at issue in this case is complete. Respondent has cited other regulations that bear upon the interpretation of the regulations at issue. These are presented in the appendix ("Resp. App.") to this brief.

## STATEMENT

Respondent, Dr. Alfredo L. Caceres, is charged with violating 18 U.S.C. § 201(b). In August 1975 Dr. Caceres was tried before a jury in the United States District Court for the Northern District of California. He raised defenses of entrapment and diminished mental capacity. The jury were unable to agree on a verdict, and the Court declared a mistrial. Before his second trial, Dr. Caceres retained new counsel and brought a motion to suppress evidence unlawfully seized by agents of the Internal Revenue Service ("IRS"). The district court found that substantial portions of the evidence in question—recordings of conversations which IRS agents made by means of electronic eavesdropping and monitoring—were obtained in violation of Internal Revenue Service Regulations and must be suppressed.

The electronic eavesdropping and monitoring on which Respondent's motion was based began in March 1974 during an audit of his individual and employment tax returns. Revenue Agent Robert K. Yee claimed that during March 1974 Dr. Caceres offered him a personal settlement in order to receive a favorable resolution of the audit (A. 20). On March 21, 1974, IRS personnel electronically eavesdropped on and recorded a conversation between Agent Yee and Dr. Caceres without Dr. Caceres's knowledge. No further investigation of Agent Yee's allegations of bribery occurred for the next ten months (A. 20-21).

On January 30, 1975, Agent Yee telephoned Dr. Caceres and proposed a meeting for the following day (A. 14-15). On February 5, 1975, Agent Yee again called Dr. Caceres and proposed a meeting for the following day (A. 16-17). During the two meetings thus arranged by Agent Yee for January 31 and February 6, 1975, IRS personnel conducted



electronic eavesdropping and monitoring against Dr. Caceres, resulting in the recordings that are the subject of this appeal. Agent Yee was wearing a concealed radio transmitter. Investigative agents, in a parked car in the vicinity of the meeting place, monitored and recorded the conversations using radio receiving and tape recording equipment (A. 69, 71).

The Internal Revenue Manual provides that IRS agents may engage in electronic eavesdropping on interviews with taxpayers only if they obtain prior written authorization from the Attorney General of the United States or his designee. Internal Revenue Manual ¶ 652.22(1). Inspector Hill, the agent in charge of the investigation, was familiar with this requirement and with the procedures by which authority had to be obtained (A. 30-31). Nonetheless the Government has conceded that the agents did not follow this procedure. Instead, they made an oral request to the Director of the Internal Security Division of the IRS. The apparent justification for the failure to comply with the prescribed procedure was that, in the agents' view, an emergency existed—despite the ten-month interval between Agent Yee's initial allegation and the electronic eavesdropping at issue here. In "emergency" cases, the Director of the Internal Security Division is empowered to grant authorization orally. Internal Revenue Manual ¶ 652.22(6).

On the basis of their conversation with the Director, the agents conducted electronic eavesdropping and monitoring against Dr. Caceres during his conversation with Agent Yee on January 31, 1975. No written request for authorization was drafted until that date (A. 36-37, 63). On February 7, 1975, one week after the written request was telecopied to Washington, the IRS submitted it to the Justice Department for review and approval (A. 78-79). In the meantime,

on February 6, the agents again conducted electronic eavesdropping and monitoring against Dr. Caceres, once again on the authority of a telephone conversation with one of their superiors within the IRS.

After hearing the agents' testimony, the district court found that there were no exigent circumstances in the investigation, and that "the only 'emergency' was created wholly by the IRS." (Pet. App. at 19a-20a)[1] Therefore, the Court concluded, the Government had not justified its failure to follow the standard authorization procedures set forth in the IRS regulations in conducting electronic eavesdropping and monitoring during the January 31, 1975 and February 6, 1975 conversations. The Ninth Circuit agreed and affirmed as to these conversations, stating:

> these "exigencies" were entirely government-created. [Citations omitted] There is no reason to believe that the requests could not have been made earlier. The investigation had been going on for some ten months, and the appellee was readily available for questioning during that time.

545 F.2d at 1186-87.

## SUMMARY OF ARGUMENT

In this case agents of the Internal Revenue Service violated the specific, mandatory procedures promulgated by their agency to govern them in the gathering of evidence in IRS investigations. By this conduct, they failed to adhere to the lawful process that, by the agency's own judg-

1. The Government's statement in its opening brief ("Gov. Br." at 9) of the reasons for the district court's finding that there was not an emergency is incomplete. The district court also relied on the fact that the agents could offer no explanation for failing to seek authorization during the ten-month hiatus between the original allegation of bribery and the electronic eavesdropping and monitoring at issue here (Pet. App. at 20a).



ment, is due all citizens with whom IRS field personnel come into contact. They thus violated the Fourth and Fifth Amendments. The district court and the court of appeals properly concluded that evidence gathered in violation of these requirements must be excluded from the trial of a cirminal case.

I. The due process of law guaranteed to all citizens by the Fifth Amendment requires, above all, that those charged with the enforcement of the laws of the United States not be left free to act arbitrarily—according to caprice or prejudice. The obligation to observe this constitutional principle, to uphold the guarantee of due process, binds the Executive Branch no less than the legislature and the judiciary. When officials of the Executive Branch decide, in discharging this obligation, that specific procedural safeguards and standards should be observed for the protection of citizens under investigation, agents of the government are bound by that judgment.

A. Law enforcement officers must be governed by standards of conduct and orderly procedures designed to assure uniform and even-handed conduct in the execution of their official duties. The importance of such standards and procedures increases with the importance of the interests affected by law enforcement activity and is greatest where fundamental personal interests, such as privacy, are implicated. The constitutional requirement that official conduct be governed by reasonably specific standards and procedures applies not only to officials responsible for the final, adjudicative phase of the legal process, determining liability or guilt and ordering relief or imposing punishment, but also to those who initiate the legal process by conducting investigations. The prevention of overreaching and abuse of official authority requires not only that

agents carrying out investigations be guided by standards governing their day-to-day conduct, but also that the responsibility for deciding to use particularly sensitive, abuse-prone investigative techniques be vested in superior government officials in a position to exercise independent judgment and oversight, free from the influence and pressures of direct involvement in local investigations. Consistent with the generally flexible character of due process requirements, the stringency of the procedures appropriate for controlling investigative conduct varies according to the degree of potential for abuse inherent in the investigative technique at issue and the importance of the private and governmental interests affected. The courts have long recognized that electronic eavesdropping and monitoring are prone to abuse as an investigative technique.

B. The Department of Justice and the Internal Revenue Service have developed regulations directly responsive to the foregoing constitutional requirements. The text and history of the development of the regulations show that they were designed to protect the constitutional rights of citizens under investigation by the IRS, and specifically to protect important personal interests in privacy and uniform administration of the law. A survey of the kinds of regulations the lower courts have been called upon to enforce, either by overturning agency action or applying exclusionary sanctions, confirms that the regulations involved here are not mere housekeeping provisions designed to improve internal agency efficiency.

C. Where an agency of the government has adopted regulations designed to protect citizens against whom it conducts investigations, agency personnel are not at liberty to act on their own. They are obliged to respect the restrictions thus imposed on their conduct unless and until the regulations are changed. Failure to comply with such



regulations violates the Due Process Clause of the Fifth Amendment. Absent the development of regulations by an agency or by the legislature, the courts must conduct their own inquiry to determine what restraints the requirements of due process of law place upon the conduct of the agency's investigative personnel. This inquiry calls for a balancing of the government's interest in efficient enforcement of the law, free from excessive cost and undue restriction, and the interests of private citizens affected by the investigative activity in question. If an agency has adopted regulations to protect those it investigates, however, the courts are not called upon to perform this difficult balancing of interests—unless the regulations themselves are attacked as failing to meet the constitutional minimum. In adopting the regulations, the agency itself has done the balancing. In the context of its own law enforcement mission, it has weighed the interests of those it investigates against whatever costs and disadvantages may be imposed by the procedure in question and has decided that this much process is due. The enforcement-level agents who conduct investigations are bound by this judgment.

II. The courts below correctly concluded that the proper remedy for this constitutional injury is exclusion of the unlawfully obtained evidence. Their decisions conform to principles this Court has articulated in applying the exclusionary rule, and the Government has failed to demonstrate any basis for exempting the conduct of its agents from this remedy.

A. In excluding the results of the agents' unlawful eavesdropping and monitoring, the courts below applied the remedy that this Court for many years has sustained as the only effective judicial response to violations of constitutional rights. The rationale for this remedy is the necessity

of deterring unlawful conduct by depriving the government of the product of such conduct. The decisions of the courts below are fully consistent with this rationale. The difficulties of deterring violations of complex and subtle due process formulas imposed on law enforcement agencies by the judiciary, and calling for instantaneous exercises of delicate judgment, simply are not presented where the unlawful conduct violates the agency's own policy manual.

B. The Government's objections to application of the exclusionary rule here are based largely on the assertedly exceptional circumstances of this case: that if the species of unlawful conduct at issue here—violations of law enforcement agencies' own regulations—are punished by exclusion of evidence, the protective procedures will be repealed; and that the misconduct in this case is not sufficiently serious to warrant exclusionary sanctions. The hypothesized threat of abandonment of the regulations is not supported or supportable by the experience of the agency and is inconsistent with the Government's assertion that the agency's disciplinary powers effectively prevent violations of its regulations. The Government's view of the seriousness of the agents' misconduct is simply a disagreement with the lower courts' findings, the correctness of which, as the Government acknowledges, is not presented on this appeal.

III. The supervisory power of the federal courts provides an alternative basis for the decisions of the courts below. Irrespective of constitutional or statutory requirements, this power may be exercised to exclude evidence acquired by substantial and serious violations of procedural rules designed to protect important personal interests. These preconditions to the exercise of supervisory power have been satisfied here. If the Court were to conclude that due process principles were incorrectly applied by the lower



courts, this case should be remanded to the district court for a factual inquiry into whether discretionary exercise of its supervisory power is warranted.

## I. THE FAILURE OF THE IRS AGENTS TO COMPLY WITH THEIR AGENCY'S REGULATIONS GOVERNING ELECTRONIC EAVESDROPPING AND MONITORING VIOLATED THE REQUIREMENTS OF DUE PROCESS OF LAW.

In its brief to this Court, the Government makes, in essence, the following argument: under the Court's decision in *United States v. White*, 401 U.S. 745 (1971), electronic eavesdropping and monitoring by the government, where one of the parties to a conversation consents to the intrusion, does not affect any constitutionally protected interests of the other. Accordingly, the IRS regulations governing such investigative activity are a matter purely of Executive grace. If the Court, therefore, were to hold the IRS to its own regulations, by excluding the product of eavesdropping and monitoring obtained in direct violation of them, the IRS might be moved to withdraw the regulations and the protection they provide altogether.

We believe this argument is based on fundamentally mistaken premises. It ignores the vital place in due process protections of the government's willingness and ability to regulate itself. In recent years this Court increasingly has recognized the centrality of this principle to judgments both of Fourth Amendment reasonableness and of due process. Indeed, the Executive Branch itself has acknowledged the principle's force and has complied with it to the extent of issuing regulations like those presented here—regulations designed to structure the intrusive power of government, and so to ensure that the power is exercised, and individual interests in privacy are abridged, only in circumstances of manifest necessity and under procedures that minimize the possibilties of abuse.

We detail the development of this principle below, both in judicial decisions and in the Executive's practice. The regulations are not a matter of Executive grace. They are essential to reasonableness under the Fourth Amendment. They provide, moreover, the government's own calculation of the due process balance between effective tax law enforcement and fairness to individuals subject to investigation. They provide, in short, the government's own judgment of what due process requires. Under an unbroken line of decisions by this and the lower federal courts, the government is obliged to comply with its own regulations, and they are subject to judicial recognition and enforcement when it does not.

### A. Due Process of Law Requires the Executive Branch to Regulate Consensual Electronic Eavesdropping and Monitoring.

1. *Consensual electronic eavesdropping and monitoring affect constitutionally protected interests in privacy and uniform administration of the law.* Standardless enforcement of the law is inconsistent with the Due Process Clause of the Fifth Amendment. *See Herndon v. Lowry*, 301 U.S. 242, 261-64 (1937); *United States v. Reese*, 92 U.S. 214, 221 (1876). A law that fails to define clearly the standard of conduct to which private citizens are to be held is unconstitutional not only because it fails to give notice of what behavior will and will not be punished, but also because it gives to those who must decide, in particular instances, whether the law has been violated an intolerable license to apply powerful public sanctions arbitrarily against private citizens. *See Smith v. Goguen*, 415 U.S. 566, 573-76 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Although this void-for-vagueness doctrine was first articulated in decisions passing upon the constitutionality of criminal statutes, administrative regulations are subject to the same scrutiny. *E.g., Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *White v. Roughton*, 530 F.2d 750, 753-54 (7th Cir. 1976). Even broad delegations of authority by the legislature to administrative agencies, although valid in themselves, do not dispense with the basic requirement of reasonably specific standards and regular procedures. On the contrary, where the legislature has not spelled out specific standards to govern agency action, the need for the agency to adopt such standards through its own processes is all the more compelling. *See California Bankers Assn. v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring); *Morton v. Ruiz, supra*, 415 U.S. at 231; *Amalgamated Meat Cutters & Butcher Work. v. Connally*, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (three-judge court, *per* Leventhal, J.).



The requirements of due process are not confined to the final phase of law enforcement. A broad range of due process restrictions are applicable at the investigative stage of governmental action. *See, e.g., United States v. Lovasco*, 431 U.S. 783 (1977); *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969); *United States v. Briggs*, 514 F.2d 794, 804-06 (5th Cir. 1975); *United States v. Tsutagawa*, 500 F.2d 420 (9th Cir. 1974). The requirement that the discretion of law enforcement agents be controlled by specific standards and procedures is among these due process restrictions. In *Smith v. Goguen, supra*, for example, the Court condemned grants of law enforcement authority whose "standardless sweep" entrusts the broad determination of what is and is not proscribed by the law "'to the moment-to-moment judgment of the policeman on his beat.'" 415 U.S. at 575; *see Grayned v. City of Rockford, supra*, 408 U.S. at 108-09; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170

(1972). Specific standards and procedures are required not only at the stage at which the sanctions of the law, such as arrest, are imposed, but also at the early stages of the development of a proceeding, when the preliminary steps of gathering evidence are taken. *E.g., Marcus v. Search Warrant,* 367 U.S. 717, 731-33 (1961).

The conduct of investigative agents must be governed by specific standards and procedures relating not only to the substantive law they enforce, but also to the investigative techniques they use. The degree of stringency called for in such standards and procedures varies according to the potential for abuse inherent in particular investigative techniques. The use of electronic eavesdropping equipment is an inherently dangerous weapon of law enforcement. *Berger v. New York,* 388 U.S. 41, 45-49 (1967); *Lopez v. United States,* 373 U.S. 427, 441 (1963) (Warren, C.J., concurring). In *Berger* the Court noted that "the 'indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments,' and imposes 'a heavier responsibility on this Court in its supervision of the fairness of procedures. . . .'" 388 U.S. at 56 (quoting *Osborn v. United States,* 385 U.S. 323, 329 n. 7 (1966)). Electronic eavesdropping not only permits government agents to hear what they otherwise could not hear, but also enables the government surreptitiously to collect and store vast amounts of information with disturbing ease. *See United States v. United States District Court,* 407 U.S. 297, 312-13 & n. 13 (1972). *See generally Whalen v. Roe,* 429 U.S. 589, 605 (1977).

Standards and procedures serve to ensure evenhandedness and uniformity in the government's dealings with the public. The caution the Court has required in the use of particularly abuse-prone investigative techniques illustrates



that uniform standards and procedures also are essential to protect other important personal interests, apart from the interest in evenhandedness. The range of private interests that come within the protection of the Fifth Amendment's Due Process Clause reflects the ideas of liberty traditionally held fundamental in Anglo-American law. *Moore v. East Cleveland,* 431 U.S. 494, 501-02 (1977) (opinion of Powell, J., quoting *Poe v. Ullman,* 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)). The interest of every citizen in freedom from undue intrusion into personal privacy has always occupied a prominent place in traditional ideas of liberty. *See, e.g., Roe v. Wade,* 410 U.S. 113, 152-53 (1973); *Katz v. United States,* 389 U.S. 347, 352-54 (1967); *Griswold v. Connecticut,* 381 U.S. 479, 484-85 (1965).[2] In particular, the value of privacy has been thought to be strongest in the context of investigations by law enforcement officers. *See, e.g., United States v. Calandra,* 414 U.S. 338, 348 (1974); *Boyd v. United States,* 116 U.S. 616, 630 (1886). During the decades immediately preceding the adoption of the Constitution, the practice of providing vaguely drawn general warrants and writs of assistance to collectors of the revenue and other law enforcement officers was widely condemned as destructive of privacy. *See, e.g., Marshall v. Barlow's, Inc.,* ..... U.S....., 56 L.Ed.2d 305, 310-11 (1978); *United States v. Chadwick,* 433 U.S. 1, 7-8 (1977); *United States v. United States District Court, supra,* 407 U.S. at 316-17; *Berger v. New York, supra,* 388 U.S. at 58; *Boyd v. United States, supra,* 116 U.S. at 625-26.

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2. Due process protection is not confined to interests that are themselves embodied in some independent constitutional right. *See Goldberg v. Kelly,* 397 U.S. 254, 261-63 (1970); *Keller v. Kate Maremount Foundation,* 365 F. Supp. 798, 801-02 (N.D. Cal. 1972). If the reach of due process were thus limited, its protection would be redundant.

That the use of electronic eavesdropping equipment affects all citizens' interests in personal privacy is clear. There can no longer be any doubt that, irrespective of the technicalities of trespass and property law, electronic eavesdropping impinges upon personal privacy and therefore must be conducted within constitutional limitations. *Katz v. United States, supra,* 389 U.S. at 352-54. The impingement on privacy caused by electronic eavesdropping is not confined to nonconsensual intrusions—where neither party to a communication has authorized the monitoring.[3] In *Osborn v. United States, supra,* two federal judges authorized the Department of Justice to arrange for a witness in a pending criminal case to carry a concealed tape recorder into meetings with an attorney in the case suspected of jury tampering. The Court refused to exclude tapes of these conversations.[4] In explaining *Osborn* in *Berger v. New York, supra,* the Court noted that there it had found that "the recording, although an invasion of privacy protected by the Fourth Amendment, was admissible because of the authorization of the judges. . . ." 388 U.S. at 56-57.

As the Court stated in *Katz v. United States, supra,* 389 U.S. at 351, the Fourth Amendment protects people, not places. Thus to evaluate the privacy interests that are affected by consensual monitoring and eavesdropping, it is necessary to identify the classes of persons affected.

3. As discussed below the history and purpose of the IRS regulations demonstrate that the government itself has recognized the impact of consensual electronic eavesdropping and monitoring on privacy. *See* pp. 32-38, *infra.*

4. The Court concluded that the intrusion occurred "under the most precise and discriminate circumstances," and fully complied with " 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.' " 385 U.S. at 329-30 (quoting from *Eaton v. Price,* 364 U.S. 263, 272 (1960) (separate opinion)).



These interests cannot be analyzed merely by considering the circumstances of those who have committed crimes. If, simply by executive self-restraint, governmental intrusions could be confined to cases in which evidence of criminality is in fact discovered, or at least legitimately suspected, the Fourth Amendment would not be needed. Obviously the only cases presented to the courts are those in which some potentially probative evidence is acquired by the disputed search or seizure: otherwise the defendant would not object by moving to exclude the evidence. The courts thus see only the tip of the iceberg. *See Elkins v. United States,* 364 U.S. 206, 217-18 (1960).[5]

In every Fourth Amendment case, the issue is not whether the Constitution should relieve those committing or contemplating criminal activity of the risk that evidence of their crimes may be discovered, but rather how to "redistribute the privacy risks throughout society," so as to confine governmental intrusions to situations in which criminal activity is afoot, in a manner consistent with the legitimate needs of law enforcement agencies. *See United States v. White, supra,* 401 U.S. at 789 (Harlan, J., dissenting). In this case, the issue is whether unrestrained and indiscriminate consensual electronic eavesdropping and monitoring, unrelated to the investigation of persons properly suspected of criminal activity, impinge significantly upon personal privacy. The interests of every citizen in

5. The Government no doubt takes the view that the electronic eavesdropping and monitoring at issue in this case were not indiscriminate or without proper foundation—that criminal activity was afoot. Its statement that a bribe occurred during the recorded conversations (Gov. Br. at 32) is, of course, a partisan assertion to be tested at trial. In any event, that contention does not bear upon the quality of the privacy interests affected, but rather upon the nature of the restraints necessary to protect these privacy interests. This latter issue—the question of how much process is due—is discussed below.

maintaining anonymity from his government, in the prevention of injurious circulation of the details of his private affairs, and in the confidentiality of private conversations as to which neither party has sanctioned a governmental intrusion demonstrate the serious threat to privacy posed by consensual electronic eavesdropping and monitoring.

Personal privacy is, in part, an interest in being let alone. Brandeis and Warren, *The Right to Privacy,* 4 Harv. L. Rev. 193, 195-96 (1890). That interest does not evaporate upon the disclosure of personal information to a single individual. Every citizen has a legitimate interest in maintaining a certain anonymity from his government—in not having government officials systematically collect and store up for later use whatever information they may chance upon in the course of their duties. Simply put, every citizen has an interest in not having his government keep track of his personal affairs—his communications, his comings and goings, his associations and relationships. *See generally, N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462-63 (1958). This privacy interest was recognized in *United States v. Holmes,* 521 F.2d 859 (5th Cir. 1975), *aff'd en banc by an equally divided court,* 537 F.2d 227 (1976), in which the Fifth Circuit held that the Fourth Amendment requires prior judicial authorization for the surreptitious attachment of a radio transmitter to a vehicle under surveillance by the police.[6] It may be conceded that the government is entitled to impinge upon that interest in a variety of ways, and need not always have a compelling

6. The dissenters in *Holmes* did not premise their dissent on the absence of a privacy interest, but rather on the view that a lesser procedural protection—a "reasonable suspicion" or probable cause standard—sufficiently protected personal privacy without the added security of prior judicial authorization. 537 F.2d at 228; *see United States v. Curtis,* 562 F.2d 1153, 1155-56 (9th Cir. 1977).



justification for doing so. Recognition of this broad range of competing governmental interests, however, does not gainsay the existence or the importance of freedom from indiscriminate government surveillance, regardless of the method by which it is accomplished. *See United States v. White, supra,* 401 U.S. at 786-87 (Harlan, J., dissenting).

Entirely apart from any interest in limiting the government's power to engage in indiscriminate surveillance, every citizen also has an interest in preventing needless, injurious circulation of confidential and often embarrassing information about himself to unintended audiences. This interest has long been recognized by the law of torts, which gives a cause of action for injurious and unprivileged publication of the details of a person's private life, even though such publication is true. The protection accorded this interest, of course, does not depend on whether the damaging, true information was acquired unlawfully, or whether the absolute secrecy of the information had been qualified previously by some disclosure to a limited audience. Restatement (Second) of Torts §§ 652A, 652D (1966).[7] A law enforcement agent or informer is free to communicate the contents of a conversation not because the other party has no privacy interest in the conversation, but rather because law enforcement officials and those working with them are privileged to communicate damaging information by virtue of the public policy in favor of effective law enforcement. The practical impact of disclosure to unintended audiences extends beyond the boundaries of causes of action recognized under state law. Even if not actionable, the disclosure of statements not made to be

7. Tax investigations, like a wide variety of other governmental inquiries, often focus upon financial transactions that cannot be discussed without revealing sensitive personal information. *See California Bankers Assn. v. Shultz, supra,* 416 U.S. at 78-79 (Powell, J., concurring).

repeated necessarily dampens the spontaneity and freedom of private conversation. *See Nixon v. Administrator of General Services,* 433 U.S. 425, 457 (1977).

Injury to privacy can be accomplished without the recording and transmission of the communication by means of electronic equipment. The simultaneous witnessing and recording of the communication by undisclosed listeners, however, has a powerful authenticating effect on the information improperly disclosed. The simultaneous transmission of private communications enables the consenting participant to corroborate what might otherwise be ignored by the unseen listeners as unfounded gossip. The recording of such communications enables both the seen and unseen listeners in turn to corroborate their injurious or improper disclosures to others. Every person's right to privacy necessarily embraces not only the interest in not having embarrassing facts publicized, but also the interest in not having them believed. That invasions of privacy may be committed without the aid of electronic eavesdropping equipment does not abate every citizen's interest in minimizing the believability and impact of information improperly disclosed.

Consideration of this interest in thwarting the communication of noncriminal but embarrassing information confirms that the privacy interests of persons other than proper suspects in criminal investigations are affected by electronic monitoring and eavesdropping. The effect of giving unlimited sanction to these investigative techniques is not merely to deprive a criminal of his ability to succeed in a perjurious rebuttal to a government agent's imperfect recollection. Rather, the injury is the uncontrolled availability of a dangerous instrument of injury to feelings and reputation. Consensual monitoring and eavesdropping require control because they threaten



> the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him. . . .

*United States v. White, supra,* 401 U.S. at 790 (Harlan, J., dissenting). *See generally United States v. King,* 478 F.2d 494, 505 (9th Cir. 1973), *cert. denied* 417 U.S. 920 (1974).

It is undisputed, of course, that every citizen may reasonably expect that his private conversations with other persons are not being overheard without at least the other person's consent. *Katz v. United States, supra.* Entirely apart from the privacy interests directly affected by consensual eavesdropping and monitoring, this expectation too would be threatened by an unlimited power in government agents to engage in these practices indiscriminately. The distinction between consensual and nonconsensual monitoring and eavesdropping has become more problematical with advances in electronic technology. *See United States v. Padilla,* 520 F.2d 526 (1st Cir. 1975). Decisions approving consensual electronic eavesdropping and monitoring without a judicial warrant have not been premised upon any assumption that the "consenting" party participated in the recorded conversation. The rationale of these decisions has been that by communicating with others, every citizen incurs the risk that his words may be repeated *by anyone within earshot.* The increasing sophistication of listening devices has complicated the question whether a particular auditor is "within earshot." The highly sensitive equipment presently used in surreptitious investigations makes it possible to overhear conversations beyond the range of normal human hearing without resorting to conventional "bugging" techniques, such as the planting of hidden microphones.

Subsequent review of a tape recording or transcript cannot verify whether the recorded conversation was or was not within the range of the ordinary human hearing of the person engaged in the transmitting or recording. In this class of cases, unlimited freedom to engage in "consensual" monitoring and eavesdropping would leave the protection against nonconsensual eavesdropping to be determined by a credibility contest over whether the government agent or informer was or was not "within earshot" of the speaker.

2. *Consensual electronic eavesdropping and monitoring call for the same measured restraints as other intrusions upon privacy.* Due process of law requires the government to do more than condemn, in a general, abstract way, improper investigative conduct by its agents. It must establish procedures to minimize the danger of such misconduct in the first instance. *See e.g., Miranda v. Arizona,* 384 U.S. 436, 467-68, 471-72 (1966). *See generally, Michigan v. Payne,* 412 U.S. 47, 52-53 (1973). Due process would have very little meaning if the government could satisfy its requirements merely by urging its agents to act judiciously, without taking any steps to assure obedience. *See Environmental Defense Fund, Inc. v. Ruckelshaus,* 439 F.2d 584, 598 (D.C. Cir. 1971).

In some circumstances the appropriate preventive measure is a restraint upon the discretion of enforcement-level agents to act without seeking a disinterested determination of the necessity for their actions.[8] *See, e.g., United*

8. Administrative agencies have an obligation to prevent abuses of decision-making authority by vesting responsibility in officials able to bring impartial, independent judgment to the decision. *See, e.g., Withrow v. Larkin,* 421 U.S. 35, 46-55 (1975); *Morrissey v. Brewer,* 408 U.S. 471, 485-86 (1972). *See generally Lee v. Macon County Board of Education,* 490 F.2d 458, 460 (5th Cir. 1974); *Bluth v. Laird,* 435 F.2d 1065, 1071-72 (4th Cir. 1970); *Relco, Inc. v. Consumer Product Safety Commission,* 391 F. Supp. 841, 845-46 (S.D. Tex. 1975).



*States v. Giordano,* 416 U.S. 505, 515-23 (1974); *United States v. King, supra,* 478 F.2d at 503-05. Prior approval is particularly appropriate for investigative techniques that threaten privacy because only rarely can the injury be redressed. The purpose of the requirement that searches and seizures be authorized in advance by an independent magistrate upon a showing of probable cause is to bring to bear upon important investigative decisions an impartial judgment that can be exercised only by officials who do not have a personal stake in the outcome of the investigation:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

*Johnson v. United States,* 333 U.S. 10, 13-14 (1948). This authorization procedure is required not only by the Fourth Amendment, but also as an element of due process of law. Indeed, it is only as an aspect of the fundamental requirements of due process that the warrant requirement binds the states. *Mapp v. Ohio,* 367 U.S. 643 (1961); *Wolf v. Colorado,* 338 U.S. 25 (1949), *overruled on other grourds,* 367 U.S. 655.[9]

9. The concept of due process is the same in the Fifth and Fourteenth Amendments. *See Bowles v. Willingham,* 321 U.S. 503, 518 (1944); *Lebowitz v. Forbes Leasing and Finance Corporation,* 326 F. Supp. 1335, 1354 (E.D. Pa. 1971), *aff'd* 456 F.2d 979 (3d Cir. 1972), *cert. denied* 409 U.S. 843 (1972). The Government's idea (Gov. Br. 27-31) that detrimental reliance by the defendant before the court is an essential ingredient in any and all due process claims ignores the fundamental implications of incorporation of the Fourth Amendment into the Fourteenth Amendment. A citizen can never rely to his detriment upon noncompliance with an

Nonconsensual electronic eavesdropping and monitoring must be supervised, constitutionally, through the oversight and authorization procedure embodied in the warrant requirement. *Katz v. United States, supra.* In *United States v. White, supra,* the Court sustained a conviction based on the testimony of government agents who, without prior judicial authorization, eavesdropped on conversations between the defendant and a government informant carrying a concealed radio transmitter. A plurality of the Court concluded that because the informant consented to this intrusion into his conversation with the defendant, the Fourth Amendment warrant requirement was inapplicable.[10] The most serious invasion of privacy occasioned by electronic eavesdropping occurs, of course, when neither party to the recorded conversation is aware of the eavesdropping. Finding no such intrusion, the plurality declined to require law enforcement agencies to observe the most stringent authorization and oversight procedure available under the Constitution—an application for a warrant, to be issued upon probable cause by a judicial officer. In *White,* however, the Court was not presented with the question whether less stringent oversight and authorization procedures might nevertheless be constitutionally required to satisfy either the reasonableness requirement of the Fourth Amendment or the Due Process Clause of the Fifth Amendment.[11] The defendant in *White* asserted neither the inadequacy of intra-executive procedures for supervising and controlling consensual electronic eavesdropping, nor any violation of whatever administratively developed procedures may have then governed the use of such techniques.



That the ultimate, most stringent form of authorization procedure—prior approval by a judicial officer upon a showing of probable cause—is not required for use of a particular investigative technique certainly does not establish that the technique may be used indiscriminately. Like all forms of due process, the requirement of reasonably

authorization requirement. There nevertheless can be no doubt that the due process clause of the Fourteenth Amendment accords to every citizen the right to the protection of prior judicial authorization before a search or seizure is conducted. Because the Government believes it has discovered probative evidence by means of the intrusions at issue in this case, it can perceive no "unfairness" to the defendant before the Court and thus no constitutional issue. This narrow view ignores the constitutionally protected interest of all citizens, who, but for constitutional restraints, would be exposed to the risk of intrusions into their privacy that yield no evidence of criminal activity. The due process clauses of the Fifth and Fourteenth Amendments provide protection far beyond the mere right not to be misled by government officials. *See, e.g., Williams v. Blount,* 314 F. Supp. 1356, 1363-64 (D.D.C. 1970).

10. Most of the lower federal courts have assumed that the rule set forth in the plurality opinion reflects the view of a majority of the Court. *See, e.g., Holmes v. Burr,* 486 F.2d 55, 58-59 (9th Cir. 1973), *cert. denied* 414 U.S. 1116 (1973), *and cases cited therein; Flemmi v. Gunter,* 410 F. Supp. 1361, 1368 n. 7 (D. Mass. 1976), *and cases cited therein.* That question need not be reached here, because this case is controlled by the measure of Fourth Amendment reasonableness and Fifth Amendment due process settled upon by the Justice Department and the IRS in administratively adopting the intra-executive warrant requirements at issue on this appeal. *See* pp. 35-38, *infra.*

11. The Fourth Amendment's proscription of "unreasonable" searches and seizures calls for the same balancing of governmental and personal interests the courts must undertake in interpreting the requirements of due process of law. *See, e.g., Marshall v. Barlow's, Inc., supra,* ..... U.S. ....., 56 L.Ed.2d at 313-17; *United States v. United States District Court, supra,* 407 U.S. at 314-15; *Berger v. New York, supra,* 388 U.S. at 53; *Terry v. Ohio,* 392 U.S. 1, 20-21 (1968); *Ker v. California,* 374 U.S. 23, 33 (1963). In Fourth Amendment cases, the personal value most explicitly considered is privacy; in due process cases, a broader range of interests is often implicated—including the fundamental interest of every citizen in the promulgation of and adherence to uniform, definite standards and procedures by those who enforce the law. The court of appeals specifically premised its decision on the Due Process Clause of the Fifth Amendment. The constitutional analysis is the same under either rubric. *See United States v. Stone,* 232 F. Supp. 396, 400 (N.D. Tex. 1964), *aff'd* 357 F.2d 257 (5th Cir. 1966).

specific standards and procedures varies according to the importance of the interests affected by governmental action. *Compare, e.g., United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), *with Smith v. Goguen, supra,* 415 U.S. at 573; *Edwards v. South Carolina,* 372 U.S. 229, 236 (1963). Due process is not a rigid set of rules that yields automatic answers. How much process may be due in a particular context can be determined only by consideration of the competing values involved:

> The analysis requires consideration of three distinct factors: "First, the private interest that will be affected . . .; second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

*Ingraham v. Wright,* 430 U.S. 651, 675 (1977) (quoting from *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976)).

The courts have taken this flexible approach in assessing how much procedural protection is constitutionally required to assure that investigative techniques affecting privacy are not abused. Particularly in passing upon searches and seizures asserted by the Government to be reasonable, although warrantless, the courts have made it clear that the protection of privacy accorded by the Constitution is not an all-or-nothing proposition. *See United States v. Barbera,* 514 F.2d 294, 301-03 (2d Cir. 1975). Decisions concerning pat-downs and investigative stops, border searches, impounded auto inventories, administrative searches, and intrusions to gather intelligence against agents of foreign governments demonstrate that if an intrusion is moderate and is justified by compelling governmental interests, some form of protection less exacting than the requirement of a warrant issued upon probable cause may be sufficient.



In *Terry v. Ohio, supra,* the Court considered whether a limited search for weapons, carried out by patting down the outer clothing of a suspect, was reasonable despite the investigating officer's conceded lack of probable cause to arrest. The Court disapproved decisions that had tried to articulate technical and abstract definitions of "search" and "seizure":

> In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, an essential element in the analysis of reasonableness. [citations omitted]
>
> . . . We therefore reject the notion that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

392 U.S. at 18-19, n. 15. The Court concluded that, in light of the moderate and carefully limited scope of the search, the compelling need of police officers to protect themselves, and the investigating officer's reasonable basis for believing that his safety required a pat-down search for weapons, the search was reasonable. *See United States v. Powers,* 439 F.2d 373, 376 (4th Cir. 1971), *cert. denied,* 402 U.S. 1011 (1971).

The Court has made the same careful calibration in balancing the governmental and personal interests implicated in searches and seizures in border areas. In *United States*

*v. Brignoni-Ponce,* 422 U.S. 873 (1975), the Court concluded that, as in *Terry,* an investigative stop of an automobile within a reasonable distance from the border,[12] though warrantless, is reasonable under the Fourth Amendment if based upon a reasonable suspicion that the vehicle contains illegal aliens. The Court arrived at this standard by balancing the amply demonstrated governmental interests in such roving-patrol stops (for which the Court found no practical alternative) against the relatively moderate privacy interests impinged upon by a brief detention of automobile occupants. The intrusion embraced only a specific inquiry about citizenship and immigration status, in contrast to a full-scale arrest or intrusion into the privacy of a residence, accompanied by a broad-ranging interrogation on suspected criminal activity. Apparent Mexican ancestry, the Court concluded, does not provide sufficient reasonable suspicion to justify even this relatively mild intrusion. 422 U.S. at 878-81, 885-86.

In several decisions upholding such moderate intrusions despite the absence of a warrant, the Court has laid special emphasis on intra-executive controls limiting the discretion of enforcement-level agents. In *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), the Court upheld routine vehicle stops at fixed check-points near the border, irrespective of probable cause to arrest or a reasonable suspicion such as would justify an investigative stop. The governmental interests urged as justifying this investigative technique were essentially the same as those presented in *Brignoni-Ponce.* 428 U.S. at 556-57. The Court considered the intrusion occasioned by a stop at a fixed check-point objectively the same as the roving-patrol stop. It

12. The "reasonable distance" within which such searches and seizures were authorized by statute, 8 U.S.C. § 1357(a)(3), had been administratively refined to mean one hundred air miles from the border. 8 C.F.R. § 287.1(a) (1975).



nevertheless found two reasons for permitting routine stops at fixed check-points: all traffic was stopped at a clearly identified station bearing symbols of authority, rendering fixed check-points less threatening and frightening. Moreover, unlike roving-patrols, the use of such check-points did not permit indiscriminate intrusions by officers in the field, who might abuse an unreviewable discretion to stop travelers on the highway:

> [C]heck-point operations both appear to and actually involve less discretionary enforcement activity. . . . The location of a fixed check-point is not chosen by officers in the field, but by officers responsible for making overall decisions as to the most effective allocation of limited enforcement resources.

428 U.S. at 559.

One of the defendants in *Martinez-Fuerte* contended that check-point stops are permissible only if the agents have obtained a warrant, somewhat similar to the area warrants discussed in *Camara v. Municipal Court,* 387 U.S. 523 (1967), authorizing routine stops at the particular check-point location in question. The Court concluded that prior judicial authorization was not called for, in part, because "the need for this is reduced when the decision to 'seize' is not entirely in the hands of the officer in the field, and deference is to be given to the administrative decisions of higher ranking officials." 428 U.S. at 566; *see United States v. Montgomery,* 561 F.2d 875, 883 (D.C. Cir. 1977).

The Court has also emphasized the importance of intra-executive controls limiting the discretion of law enforcement agents in upholding warrantless inventorying of the contents of impounded automobiles. In *South Dakota v. Opperman,* 428 U.S. 364 (1976), police inventoried the contents of a car impounded for parking violations. No

warrant was obtained for searching the car, including the glove compartment, in order to collect any valuables and store them for safekeeping. At the time of the inventory, the police did not suspect criminal activity. Referring to its decisions upholding warrantless searches of automobiles, the Court concluded that the search was reasonable despite the absence of probable cause. Repeatedly, the Court alluded to standard police procedures that limited the officers' discretion in searching impounded automobiles. 428 U.S. at 366, 369, 372, 376. The Court relied heavily upon *Cady v. Dombrowski,* 413 U.S. 433 (1973), observing that there it had "carefully noted that the protective search was carried out in accordance with *standard procedures* in the local police department, *ibid.,* a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function." 428 U.S. at 374-75 (emphasis in original).[13] Mr. Justice Powell did not believe that inventory searches of impounded automobiles fell within the "automobile search" exception to the warrant requirement, since that exception is based upon the danger that an automobile will be removed before a warrant can be sought—a problem not presented with respect to impounded automobiles. He nevertheless concluded that prior judicial authorization for such searches is unnecessary because

13. The concurrence of Mr. Justice Powell, which was necessary to the judgment in *Opperman,* specifically relied upon this intra-executive safeguard:

> As the Court's opinion emphasizes, the search here was limited to an inventory of the unoccupied automobile and was conducted strictly in accordance with the regulations of the Vermillion Police Department. Upholding searches of this type provides no general license for the police to examine all of the contents of such automobiles.

428 U.S. at 380.



> [T]he officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.

428 U.S. at 383; *see United States v. Edwards,* 498 F.2d 496, 499-500 (2d Cir. 1974); *United States v. Spitalieri,* 391 F. Supp. 167, 169 (N.D. Ohio 1975).

Administrative searches provide yet another example of the Court's effort to tailor constitutional requirements by measuring the impact of a particular investigative technique on privacy and on the government's interest in effective law enforcement. In *Camara v. Municipal Court, supra,* the Court held that administrative searches of private dwellings by health inspectors, under the authority of local housing codes, are subject to the Fourth Amendment warrant requirement; but that the requirement of probable cause for such searches, commonly conducted as part of inspections of large areas targeted as likely to have health and housing problems, may be satisfied by meeting a less demanding standard of reasonableness. The issuance of a warrant for such searches is reasonable, the Court explained, if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." 387 U.S. at 538.[14] *Cf. United States v. Bradley,* 571 F.2d 787, 789-90 (4th Cir. 1978).

14. The use of administratively determined search standards has also been suggested as a substitute for conventional probable cause to conduct roving border patrol searches. *Almeida-Sanchez v. United States,* 413 U.S. 266, 275, 283-84 (1973) (Powell, J., concurring).

In several cases, the Government has contended that electronic eavesdropping against agents of foreign governments carried out under authority of the President's constitutional power to protect national security is not subject to the warrant requirement of the Fourth Amendment. Recognition of such an exception has generally been proposed on the understanding that such eavesdropping would be carefully controlled by requiring prior authorization by high officials in the executive branch. *See Katz v. United States*, *supra*, 389 U.S. at 363-64 (White, J., concurring); Electronic Surveillance within the U.S. for Foreign Intelligence Purposes: Hearings on S.3197, the Foreign Intelligence Surveillance Act of 1976, before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Committee on Intelligence, 94th Cong., 2d Sess. 37-40 (1976) (address by The Hon. Edward H. Levi) (Resp. App. at 6-14). *See generally, United States v. Ehrlichman*, 546 F.2d 910, 923-28 (D.C. Cir. 1976), *cert. denied* 429 U.S. 1120 (1977). These views are consistent with the practice of the Department of Justice, with isolated exceptions, over the past fifty years. Levi Address, *supra*, at 23-25. (Resp. App. at 1-5).[15] Even where judicial intervention is not required by the Constitution, it nevertheless is imperative that officials of the executive branch act judiciously in order to prevent abuses.

15. On January 24, 1978, the President issued an executive order restricting electronic surveillance in foreign intelligence cases. The order provides that in such investigations information is to be gathered by "the least intrusive means possible. . . ". Electronic surveillance is forbidden

> unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power.

Exec. Order No. 12036, § 2-201(a), (b) at 16, 43 Fed. Reg. 3674 at 3685 (1978).



The measured restraints adjudicated in these cases throw into high relief the extremity of the Government's position in this case. The ruling it seeks would confer upon any state or federal investigative agent an unlimited power surreptitiously to record and transmit simultaneously to any other persons, by means of electronic eavesdropping equipment, any statement of any citizen made within earshot of a government agent (whether identified or unidentified) or an informer cooperating with such an agent. Moreover, if the Court were to accept the Government's view of the right of privacy, this unlimited power would necessarily embrace the use of other monitoring and surveillance techniques. Investigative agents would be entitled to use surreptitiously placed radio transmitters (such as those attached to automobiles in the "beeper" cases discussed above) to monitor the whereabouts of any citizen, regardless of whether such monitoring served the legitimate needs of law enforcement. The indiscriminate use of electronic eavesdropping equipment holds the same potential for injury to the privacy of all citizens inherent in indiscriminate resort to weapons pat-downs by police officers, roving-patrol and fixed check-point stops by border patrol agents, automobile inventories by police impound personnel, and business inspections by regulatory agency investigators. The abuse-prone character of this particular investigative technique makes it the least likely candidate for the special exemption the Government seeks from its duty of self-restraint in this case.

### B. The IRS Regulations Governing the Authorization of Electronic Eavesdropping Express the Response of the Executive Branch to the Requirements of Due Process.

The Internal Revenue Service regulations at issue in this case were developed to protect the important personal

interests of every citizen in personal privacy and uniform, consistent administration of the law. This conclusion is supported by the text of the regulations, the historical setting in which they were adopted, and the clear contrast between these rules and the diversity of less imperative regulations the courts have considered in other contexts.

The primary responsibility for investigating criminal violations of the federal tax laws lies with the Intelligence Division of the Internal Revenue Service (recently renamed the Criminal Investigations Division). The Internal Security Division of the IRS is chiefly concerned with investigating allegations against IRS personnel, but also has responsibility for investigating a narrow class of criminal allegations against taxpayers, including allegations of bribery. Paragraph 652 of the Internal Revenue Manual sets forth specific, mandatory procedures to be followed in every case in which electronic eavesdropping or monitoring is to be conducted. For eavesdropping or monitoring involving nontelephonic communications, the written approval of the Attorney General or his designee is to be sought forty-eight hours before the intrusion is to occur. Agents are directed to include in their requests for approval an explanation of the reasons justifying the proposed intrusion, the equipment to be used, the names of the persons involved, where the eavesdropping or monitoring is to occur and for how long, and the technical method by which the equipment will be installed. Internal Revenue Manual ¶ 652.22(2), (3). The regulations provide that electronic eavesdropping authorization will be granted only when, "in the considered judgment of the designated official, such action is warranted and necessary to effective law enforcement." Internal Revenue Manual ¶ 652.1(5). Approval is not to be granted unless the approving official "is fully



convinced that the investigation warrants the use of such techniques." Internal Revenue Manual ¶ 652.21(4). Within forty-eight hours after any intrusion, a follow-up report is to be prepared by the field office responsible for the investigation. The report is to be forwarded to the National Office of the Internal Revenue Service.

In an emergency, the authorization normally to be sought from the Attorney General may be given by the Director or Acting Director of the Internal Security Division of the IRS, or by the Assistant Commissioner of the IRS for Inspection. These officials are forbidden to delegate their power of approval. Internal Revenue Manual ¶ 652.22(6). When emergency approval is granted by these officials, the field office is to complete and transmit to the National Office of the IRS by telecopier the written request for authorization used in non-emergency cases. This report is to be transmitted immediately and is to include an affidavit from the enforcement-level employee directly involved in the electronic eavesdropping or monitoring and "*an explanation of the specific conditions that precluded obtaining advanced approval. . . .*" Internal Revenue Manual ¶ 652.22(6) (emphasis in original). To assure that the obligations of field personnel are spelled out with the utmost clarity, the IRS has designed printed forms on which requests for authorization and follow-up reports are to be submitted. Internal Revenue Manual ¶¶ 652.21, 652.22.

The regulations also provide for strict control over access to electronic eavesdropping equipment. In each regional office, the equipment is to be stored in a central, locked facility. An equipment custodian is to be designated by the Regional Inspector. Access to the equipment is to be limited to the top officials of each regional office and the custodian.

Each piece of electronic eavesdropping equipment maintained at any field office is to be described on a separate entry card in a record system accounting for all equipment at that location. Special forms are provided for recording the movement of any equipment in and out of locked storage. These forms include information concerning the specific investigation in which the equipment has been used (case title and number), the date the equipment was returned, and a list of the dates on which the equipment was used. These forms are to be forwarded to the Regional Inspector and filed along with the request forms on which authorization for the electronic eavesdropping in question was sought. Each equipment custodian is to submit an annual report detailing the inventory of electronic eavesdropping equipment on hand at the particular field office. These annual reports are to be submitted to the National Office of the Internal Revenue Service to be used by the Assistant Commissioner of Inspection in preparing his annual report to the Assistant Attorney General for the Criminal Division. That report is to describe the IRS's current inventory of electronic eavesdropping equipment and narrate briefly the results of the agency's electronic eavesdropping activities during the preceding year. Internal Revenue Manual ¶ 652.4(1)-(7) (Resp. App. at 18-20).

This detailed system of controls on the use of electronic eavesdropping equipment is not confined to the Internal Security Division of the IRS. Special Agents in the Criminal Investigations Division are subject to virtually identical restraints. Internal Revenue Manual ¶¶ 9389.1-9389.9. The regulations for both divisions recite that they implement Internal Revenue Service policy on electronic eavesdropping, as set forth in Policy Statement P-9-35. In implementing that Policy Statement (*See* IRS Manual Supplement dated April 11, 1974, Resp. App. at 15-17) the



IRS underscored what is manifestly apparent from the very structure of the regulations—that these procedures are designed to prevent invasions of privacy and arbitrary, capricious conduct by field personnel:

> The monitoring of conversations with the consent of one of the participants is an effective and reliable technique but must be sparingly and carefully used. The Department of Justice has encouraged its use by criminal investigators where it is both appropriate and necessary to establish a criminal offense. *While such monitoring is constitutionally and statutorially permissible, this investigative technique is subject to careful regulation in order to avoid any abuse or unwarranted invasion of privacy.*

(emphasis added); *see* Internal Revenue Manual ¶ 9389.1 (5).

These regulations were promulgated a number of years before the 1972 Justice Department Memorandum cited by the Government (Gov. Br. at 21). They grew out of a series of alarming revelations of widespread abuses of investigative authority by the Internal Revenue Service and other federal agencies in 1965. Most of the abuses were discovered in the course of hearings held by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary. The subcommittee surveyed the investigative techniques of a number of federal agencies, and particularly their use of electronic equipment. *Invasions of Privacy (Government Agencies): Hearings Pursuant to S. Res. 39 Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Senate,* 89th Cong., 1st Sess. 1-12 (1965) ("S.Res. 39 Hearings") These hearings revealed indiscriminate and often unlawful use of various sensitive investigative techniques, including wiretapping, surveillance, bugging, electronic eavesdropping, and improper seizure and opening of

personal first class mail, by the field personnel of many federal agencies. S.Res. 39 Hearings, *supra*, at 345-49 (Part 2), 364-86 (Part 2), 1130-31 (Part 3), 1645-46 (Part 4), 1945-53 (Part 4), 1834-37 (Part 4); *Right of Privacy Act of 1967: Hearings Pursuant to S.Res. 25 on S. 928 Before The Subcomm. on Administrative Practice and Procedure of The Comm. on The Judiciary of the U.S. Senate*, 90th Cong., 1st Sess., 15, 16, 29 ("S. 928 Hearings"). Investigative personnel of the Internal Revenue Service were among the worst offenders. The indiscriminate use of a wide variety of electronic eavesdropping equipment was found to be common in a number of Internal Revenue Service regional offices. *See* S. Res. 39 Hearings, *supra*, at 1518-26 (Part 3), 1531-34 (Part 3), 1548-56 (Part 3), 1740-49 (Part 4), 1762-63 (Part 4), 1775-77 (Part 4), 1828-30 (Part 4), 1923-35 (Part 4), 1999-2003 (Part 4), 2021-30 (Part 4), 2055-58 (Part 4); S. 928 Hearings, *supra*, at 1133-44, 1155-56, 1199-1203. The agency had been conducting a special school to train its agents in questionable and even unlawful uses of investigative techniques. S.Res. 39 Hearings, *supra*, at 1512-17 (Part 3), 1730-33 (Part 4), 2016-17 (Part 4), 2030-44 (Part 4). Among the complaints considered by the subcommittee was routine eavesdropping on meetings and telephone conversations between Revenue Agents and taxpayers. S. 928 Hearings, *supra*, at 15, 16, 29. Supervisory personnel were aware of the widespread use of electronic eavesdropping equipment and condoned it. S.Res. 39 Hearings, *supra*, at 1546-47 (Part 3). The Commissioner of Internal Revenue candidly admitted to the subcommittee that the frequency and flagrancy of improper investigative activity by field personnel had gone undetected by high officials within the agency and that the agency had failed to take steps to control such activity. *Id.*, at 1118, 1124 (Part 3).



Reacting to these revelations, President Johnson issued a directive to all executive agencies on June 30, 1965 forbidding wiretapping and electronic eavesdropping, except in cases involving national security. *See United States v. White, supra*, 401 U.S. at 767 (Appendix II to Opinion of Douglas, J., dissenting). This order was a direct response to the abuses of investigative authority within the Internal Revenue Service discovered during the hearings. New York Times, Friday, July 16, 1965. The President commissioned an exhaustive study of the use of electronic eavesdropping techniques by federal agencies. S.Res. 39 Hearings, *supra*, at 1130 (Part 3); N. Y. Times, August 29, 1965, at 6, col. 3; N. Y. Times, July 7, 1967, at 1, col. 1.

In July 1965, the Internal Revenue Service convened a special inquiry board to investigate electronic eavesdropping practices within the agency over the preceding eight years. S.Res. 39 Hearings, *supra*, at 1126, 1142; Stand. Fed. Tax Rep. (CCH) ¶ 6711 (1967) (Resp. App. at 21). The Commissioner of Internal Revenue sent telegrams to each district office instructing field personnel to compile a history of all known instances of wiretapping, bugging, and other electronic eavesdropping and monitoring, both consensual and nonconsensual. S. 928 Hearings, *supra*, at 30-32. The Commissioner promised the Administrative Practices Subcommittee a full accounting of the abuses within the agency. S.Res. 39 Hearings, *supra*, at 1144: Stand. Fed. Tax Rep. (CCH) ¶ 6711 at 71,754 (1967) (Resp. App. at 21). In July 1967, the Internal Revenue Service issued a press release (News Release No. 890), summarizing its report to the subcommittee, which the Commissioner had transmitted in the form of a letter and supporting exhibits. Stand. Fed. Tax Rep. (CCH) ¶ 6711 (1967). The letter and press release also announced the adoption, upon the recommendation of the special inquiry board convened

in July 1965, of procedures to prevent improper electronic eavesdropping and monitoring. After reviewing the extent of the problem, the Commissioner stated:

> To correct the situation, I issued unmistakeably clear and detailed proscriptions on investigative techniques and set forth the Service's policy in drastic and unmistakeable terms. Steps have also been taken to bring all facets of our investigative activity under the Service's normal National Office, Regional Office and District Office system of direction and control.

Stand. Fed. Tax Rep. (CCH) ¶ 6711 at 71,755 (1967) (Resp. App. at 27).

At the same time, the Attorney General acted upon the results of the two-year study of electronic eavesdropping commissioned by the President in June 1965. N. Y. Times, July 7, 1967, at 1, col. 1. The Department of Justice circulated a memorandum on electronic eavesdropping to all federal agencies directing the development of agency regulations substantially similar to those adopted by the Internal Revenue Service. *Id.;* N. Y. Times, August 26, 1967, at 13, col. 1. The basic guidelines set forth in that memorandum have been carried forward through the successive presidential administrations, and the Justice Department memorandum has been reissued in essentially the same form by later Attorneys General. The Internal Revenue Service regulations announced in July 1967 have remained substantially unchanged in the last eleven years.

It is thus abundantly clear that these regulations were promulgated to protect important personal interests.[16] A

16. Indeed the Government has taken the position that Army regulations similar to these IRS regulations provide sufficient protection of personal privacy to justify dispensing with the warrant requirement in cases of electronic surveillance against American citizens residing abroad. *Berlin Democratic Club v. Rumsfeld,* 410 F. Supp. 144, 159 (D.D.C. 1976).



substantial body of decisions evaluating a wide variety of administrative regulations has made plain the distinction in judicial enforceability between regulations designed to protect important personal interests, such a privacy, and regulations merely designed to improve an agency's "housekeeping." *Compare Morton v. Ruiz, supra,* 415 U.S. at 235; *Bridges v. Wixon,* 326 U.S. 135, 152-54 (1945); *United States v. Sourapas,* 515 F.2d 295 (9th Cir. 1975); *United States v. Leahey,* 434 F.2d 7 (1st Cir. 1970); *United States v. Heffner,* 420 F.2d 809 (4th Cir. 1969); *United States v. Coleman,* 478 F.2d 1371, 1374 (9th Cir. 1973); *with Lyman v. United States,* 500 F.2d 1394 (Temp. Emerg. Ct. App. 1974); *United States v. Bunch,* 399 F. Supp. 1156, 1162 n. 5 (D. Md. 1975), *aff'd* 542 F.2d 629 (4th Cir. 1976); *Van Teslaar v. Bender,* 365 F. Supp. 1007, 1010 (D. Md. 1973). *See generally, American Farm Lines v. Black Ball Freight,* 397 U.S. 532, 538-39 (1970).

*United States v. Mapp,* 561 F.2d 685, 690 (7th Cir. 1977) illustrates the contrast. There a defendant sought exclusion of statements made to an IRS Revenue Agent at a point in an investigation when, according to a section of the Internal Revenue Service Audit Technique Handbook, a referral should have been made to the Intelligence Division because the discovery of evidence of fraud required a Special Agent "to evaluate the criminal potential of the case and decide whether a joint investigation should be initiated." The purpose of the regulation is to ensure expert input on potential criminal cases, rather than to protect individual rights. Accordingly, the court refused to suppress the evidence. *See United States v. Lockyer,* 448 F.2d 417, 419-22 (10th Cir. 1971); *United States v. Goldstein,* 342 F.

Supp. 661, 668 (E.D.N.Y. 1972). *See generally, Rosenberg v. C.I.R.*, 450 F.2d 529, 532-33 (10th Cir. 1971).[17]

*Rinaldi v. United States*, 434 U.S. 22 (1977) certainly does not suggest a different perception of the distinction between housekeeping rules and rules designed to protect important personal interests. There a federal conviction was obtained on the basis of the same robbery offense of which the defendant had been convicted in State Court. The United States Attorney prosecuting the case proceeded with the trial despite the well-established policy of the Department of Justice against initiating federal prosecutions arising out of the same facts on which a state conviction has been obtained. The Department has required that departures from this general policy be authorized only upon "compelling reasons," as judged by an Assistant Attorney General. 434 U.S. at 24 & n. 5. In *Rinaldi*, the Government sought to set aside the conviction on the ground that this procedure had not been followed. Because the Government's motion to dismiss the indictment was

17. The Government cites *Sullivan v. United States*, 348 U.S. 170 (1954) as an example of a "housekeeping" regulation. The purpose of the regulation at issue there bears no resemblance to the purpose of the regulations in this case. In *Sullivan* the defendant sought to overturn his conviction on the ground that it resulted from an indictment returned on the basis of evidence purportedly presented to the grand jury by the district attorney without proper authorization by the Office of the Attorney General. At issue were an Executive Order and Department of Justice Circular Letter requiring approval from the Attorney General's office before the presentation of evidence to the grand jury concerning violations of federal revenue laws. These directives paralleled a statutory restriction, 26 U.S.C. § 3740, against the initiation of civil tax proceedings by the United States Attorney without the authorization of both the Attorney General and the Commissioner of Internal Revenue. The apparent purpose of these restraints was to assure that decisions to enforce the tax laws would be informed by a judgment as to the impact of a judicial decision on overall tax policy. Moreover, the Court concluded that the Executive Order and Circular Letter could not be read as a curtailment of "the well-recognized power of the Grand Jury to consider and investigate any alleged crime within its jurisdiction." 348 U.S. at 173.



not made until after the trial, and because the United States Attorney had acted in bad faith in informing the court that the Department had authorized the prosecution, the district court declined to set aside the conviction. Both the Government and the defendant appealed from that denial, and this Court ultimately overturned the conviction.[18]

The policy at issue in *Rinaldi* is designed to accord defendants the same protection against unfairness provided by the Double Jeopardy Clause and the Due Process Clause. The need to enforce the policy over the Department's protest, however, never arises. If, even after conviction, a defendant complains of lack of proper authorization for a duplicative prosecution, the Department can remedy the violation as it did in *Rinaldi*. The authorization procedures at issue in this case, in contrast, are in part for the protection of persons not before the court—the taxpayers against whom unauthorized, improper electronic eavesdropping is

18. The Government infers (Gov. Br. at 25 & n. 7) that the Court's enforcement of the policy against duplicative prosecutions at the instance of the Government demonstrates that the policy would not be enforced over the Government's objection, and a number of Circuit Court decisions are cited in support of this view. In these decisions, however, the defendant was necessarily challenging the Department's findings of "compelling reasons", made either before or after the trial, justifying an exception to its usual policy against duplicative prosecutions. The policy requires an Assistant Attorney General to exercise discretion—to find "compelling reasons"—before making an exception. By hypothesis, such discretion has been exercised in every case where the Department of Justice asserts the appropriateness of a second prosecution, either before trial or in the appellate courts. The Circuit Court decisions cited by the Government thus would appear to say no more than that such exercises of discretion are not judicially reviewable—as is no doubt true of decisions of an Assistant Attorney General to grant a request for authorizations submitted pursuant to the Internal Revenue Service's regulations on electronic eavesdropping.

conducted without any eventual criminal proceedings. The harm inflicted by these intrusions cannot be undone after the fact.

The procedures at issue here are also easily distinguishable from merely directory declarations of an agency's policies and goals. *Cf. United States v. Walden,* 490 F.2d 372, 376-77 (4th Cir. 1974); *United States v. Reeb,* 433 F.2d 381, 384 (9th Cir. 1970); *Smith v. United States,* 478 F.2d 398, 400 (5th Cir. 1973); *Rosenberg v. C.I.R., supra,* 450 F.2d at 532-33. The agency has consciously chosen to expend the resources and effort necessary to carry out stringent protective measures in every case—without exception. It has decided that mandatory procedures, rather than mere precatory guidelines or policy statements, are consistent with both its law enforcement mission and its obligation, entirely independent of judicial compulsion, to respect and uphold the constitutional rights of those it investigates. To assure that its judgment is carried out, it has spelled out with the greatest clarity and simplicity each step that its agents must take, and it has enjoined them in the sternest possible terms against relaxing their compliance with these commands.

### C. Due Process of Law Requires That Regulations Promulgated by the Executive Branch Be Obeyed by Agents of the Government Unless and Until Changed.

As demonstrated above, due process of law requires the promulgation of standards and procedures to govern the conduct of investigative agents, and in this case the Executive Branch has responded to that requirement by developing administrative regulations providing authorization and oversight procedures governing the use of electronic eavesdropping equipment. It is undisputed that the procedures were disregarded in this case. Under these circumstances,



the Government has failed to meet the requirements of due process of law. The due process requirement that standards and procedures be developed to prevent arbitrary exercises of authority would provide scant protection if, after higher officials of an agency have made rules, investigative agents could disregard them.

This Court has consistently held that regulations promulgated by administrative agencies to protect important personal interests have the force and effect of law. So long as they remain in effect, they must be obeyed by agents of the government as well as by private citizens. *United States v. Nixon,* 418 U.S. 683, 695-96 (1974); *Morton v. Ruiz, supra,* 415 U.S. at 235; *Yellin v. United States,* 374 U.S. 109 (1963); *Vitarelli v. Seaton,* 359 U.S. 535 (1959); *Service v. Dulles,* 354 U.S. 363 (1957); *Accardi v. Shaughnessy,* 347 U.S. 260 (1954); *Bridges v. Wixon, supra,* 326 U.S. at 150-53. This fundamental principle is generally regarded as originating in the *Accardi* case, in which the Court overturned the denial of a writ of habeas corpus by a deportee attacking the denial of his application for suspension of deportation.

The principle announced in *Accardi* has become "a settled rule that has been enforced in a wide variety of contexts." *Checkman v. Laird,* 469 F.2d 773, 780 (2d Cir. 1972). Federal agencies have been held to their regulations on matters of the utmost sensitivity. *Accardi* itself involved a regulation governing immigration, a subject over which the federal government has always had plenary power. *See Kleindienst v. Mandel,* 408 U.S. 753, 765-67 (1972). Violation of agency procedures has been the basis for reversing discharge of government employees on grounds of national security. *Vitarelli v. Seaton, supra; Service v. Dulles, supra.* Although

Congress has absolute discretion in choosing its rules of operation, *see United States v. Ballin*, 144 U.S. 1, 5 (1892), even instrumentalities of the legislative branch have been held bound by their own rules. *Yellin v. United States, supra. See generally United States v. Nixon, supra,* 418 U.S. at 694-96. Although the role of the courts in reviewing administrative action by the armed forces has always been narrowly limited, *see Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), even military regulations "once issued must be followed scrupulously." *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, 706 (4th Cir. 1969); *see Sanger v. Seamans*, 507 F.2d 814, 817 (9th Cir. 1974).

*Accardi* itself did not explicitly rest upon a constitutional basis. *See Board of Curators, Univ. of Mo. v. Horowitz*, ..... U.S. ....., 55 L. Ed. 2d 124, 136 n. 8 (1978). That there is a due process aspect, however, to the principle announced in *Accardi* is clear: "some compliance with previously established rules—particularly rules providing procedural safeguards—is constitutionally required before the State or one of its agencies may deprive a citizen of a valuable liberty or property interest." *Id.*, 55 L. Ed. 2d at 146 n. 22 (Marshall, J., dissenting). This observation is supported by judicial decisions both before and after *Accardi*. In describing the Attorney General's deportation regulations as having the force and effect of law, the *Accardi* Court relied on *Bridges v. Wixon, supra*. In that case the Court overturned a deportation order because the deportation investigation had been conducted in violation of agency regulations requiring that statements secured from any person during the investigation be transcribed and signed under oath by the witness interviewed. The Court held that "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." 326 U.S. at 153. It observed that the



investigative rules were "designed as safeguards against essentially unfair procedures" and were designed "to protect interests of the alien and to afford him due process of law." 326 U.S. at 152, 153, 154.[19]

Nearly every federal decision since *Accardi* that has addressed the issue has concluded that the principle announced in that case is grounded not only in federal administrative law, but also in the Due Process Clause of the Fifth Amendment. As Judge McCree observed in *Antonuk v. United States*, 445 F.2d 592, 595 (6th Cir. 1971), citing *Accardi*, "violation by the military of its own regulations constitutes a violation of an individual's right to due process of law [citations omitted]."[20]

Requiring the government to obey its own rules is not judicial interference in law enforcement, but rather the exercise of restraint to avoid difficult issues that need not

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19. The Government contends, as it did in *United States v. Leahey, supra*, 434 F.2d at 9, that the *Accardi* doctrine applies only in adjudicative contexts. The very case on which *Accardi* itself was premised, however, involved restrictions on the gathering of evidence in connection with deportation investigations. *Bridges v. Wixon, supra*, 326 U.S. at 150-53.

20. *See Konn v. Laird*, 460 F.2d 1318, 1319 (7th Cir. 1972); *Like v. Carter*, 448 F.2d 798, 803 (8th Cir. 1971); *Hollingsworth v. Balcom*, 441 F.2d 419, 421 (6th Cir. 1971); *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970); *United States v. Leahey, supra*, 434 F.2d at 8-9 (1st Cir. 1970); *United States v. Lloyd*, 431 F.2d 160, 171 (9th Cir. 1970); *Government of Canal Zone v. Brooks*, 427 F.2d 346, 347 (5th Cir. 1970); *United States v. Heffner, supra*, 420 F.2d at 811-12 (4th Cir. 1969); *Whiteside v. Kay*, 446 F. Supp. 716, 719 (W.D. La. 1978); *Hupart v. Bd. of Higher Ed. of City of New York*, 420 F. Supp. 1087, 1107 (S.D.N.Y. 1976); *Coomes v. Adkinson*, 414 F. Supp. 975, 995-96 (D.S.D. 1976); *Myers v. Parkinson*, 398 F. Supp. 727, 730 (E.D. Wis. 1975); *Stokes v. Lecce*, 384 F. Supp. 1039, 1048-49 (E.D. Pa. 1974); *United States v. Capra*, 372 F. Supp. 609, 611-12 (S.D.N.Y. 1974); *Berends v. Butz*, 357 F. Supp. 143, 151 (D. Minn. 1973); *Otero v. New York City Housing Authority*, 344 F. Supp. 737, 745 & n. 13 (S.D.N.Y. 1972); *Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F.Supp. 602, 606 (D. Minn. 1972). *Contra, Bates v. Sponberg*, 547 F.2d 325, 330 (6th Cir. 1976).

be reached to render a decision. Absent the benefit of any administratively or legislatively developed standards, the courts must come to their own judgments of how much process is due under the circumstances presented. As noted above, that judgment must be based upon a delicate and difficult balancing of individual and governmental interests. *See United States v. Perez*, 440 F. Supp. 272, 279-80 (N.D. Ohio 1977), *aff'd* 571 F.2d 584 (6th Cir. 1978), *cert. denied* 56 L.Ed.2d 88 (1978). The same judgment is required where procedural protections developed legislatively or administratively are attacked as constitutionally insufficient. Where the government has adopted procedural protections, however, and its agents have failed to obey such commands, the difficult task of judicially balancing the interests is unnecessary. Whatever judgment the court might reach in weighing the competing considerations on its own is pre-empted by the judgment of the agency. It has decided how much process is due and presumably has balanced the interests of those affected by its action and the interests represented by its own law enforcement mission in the course of coming to its own judgment. Under these circumstances, as Judge McCree noted in overturning a violation of military regulations, "the due process clause here requires us not to measure the army regulations against some constitutional standard, but instead to determine whether the regulations were followed." *Antonuk v. United States, supra*, 445 F.2d at 595. *See generally Like v. Carter, supra*, 448 F.2d at 804. The imposition of judicial notions of proper investigative practice upon law enforcement agencies critized by the Government (Gov. Br. at 18-19) is not a danger in such cases. *Cf. Miranda v. Arizona, supra*, 384 U.S. at 490.

The Court has exercised this deference to the government's evaluation of how much process is due in the context



of a Fourth Amendment challenge to an administrative search. In *Colonnade Corp. v. United States*, 397 U.S. 72 (1970), agents of the Internal Revenue Service sought permission to inspect a locked liquor storeroom in order to investigate possible violations of the federal excise tax law. On being refused, and without any prior judicial authorization, one of the agents broke the lock and entered the storeroom. The proprietor brought an independent action for recovery of seized property and for suppression of such property as evidence. The authority of the agents to conduct inspections derived from 26 U.S.C. §§ 5146(b), 7606. Refusals by retail liquor dealers to permit such inspections were punishable by a five hundred dollar forfeiture, 26 U.S.C. § 7342.

The Court concluded that the unusually intense degree of governmental supervision of the liquor industry justified an exception to the warrant requirement. It nevertheless held that Congress had struck its own balance in deciding what investigative techniques were reasonable under these laws; and that the balance thus struck was binding upon the agents:

> As respects [the liquor] industry, and its various branches including retailers, Congress had broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

397 U.S. at 77.

The same reasoning has been applied to administrative regulations. In *Marshall v. Barlow's Inc., supra*, a Labor

Department inspector attempted a routine but warrantless search of the business premises of an employer subject to the requirements of the Occupational Safety and Health Act ("OSHA"). Although the Act authorized such searches, 29 U.S.C. § 657(a) (1970), the employer refused to permit the inspection on Fourth Amendment grounds. The Government argued that warrantless searches under OSHA were reasonable, and thus not violative of the Fourth Amendment, because of the limitations on search discretion established in the Act and applicable regulations. In rejecting the Secretary's contention that compliance with the warrant requirement would unduly hamper the agency in carrying out its law enforcement mission, the Court noted that the agency's own previous judgment, as expressed in its regulations, contradicted this assertion. The Secretary of Labor had promulgated regulations providing that inspectors refused entry by employers were to set in motion the steps needed to resort to judicial process to compel access for an inspection:

> The regulation represents a choice to proceed by process where entry is refused; and on the basis of evidence available from present practice, the Act's effectiveness has not been crippled by [this procedure].

56 L.Ed.2d at 314-15. The agency had already expressed its judgment that resort to judicial process would not unduly hamper its mission by changing its operating manual to require compulsory process where an employer has refused entry. 56 L.Ed.2d at 315 & n. 13. The Court took the agency at its word:

> If this safeguard endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it.



*Id.; see Mogavero v. McLucas*, 543 F.2d 1081, 1084-85 (4th Cir. 1976); *Randolph v. Willis*, 220 F. Supp. 355, 358 (S.D. Cal. 1963).[21]

Effectuation of a law enforcement agency's judgment of how much process is due does not always benefit those against whom the agency has moved. Where an agency has promulgated standards and procedures in discharging its obligation to fulfill the requirements of due process of law, the courts must give considerable weight to the particular balance of governmental and individual interests struck by the agency. *See United States v. Watson*, 423 U.S. 411, 414-16 (1976); *Morales v. Schmidt*, 494 F.2d 85, 87-88 (7th Cir. 1974) (Stevens, J., concurring); *United States v. Perry*, 449 F.2d 1026, 1037 (D.C. Cir. 1971). Although the court might have found a different accommodation of these interests appropriate—perhaps one more onerous to the government—the agency's greater familiarity with the problems peculiar to its own enforcement mission calls for judicial deference. There is no sound reason for making this deference a one-way street—a presumption that the Government may invoke or abjure according to its own convenience.

We do not understand the Government to contend that the procedures embodied in the IRS regulations would not be binding upon the agency even if enacted by Congress. *See Colonnade Corp. v. United States, supra.* Rather, the Government asserts (Gov. Br. at 34, 35 & nn. 19, 20) that

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21. Even where the agency in question has not adopted investigative regulations, the Court has employed essentially the same analysis by consulting the rules and law enforcement experience of similar agencies. In adopting the safeguards announced in *Miranda v. Arizona, supra*, for example, the Court laid great emphasis upon the fact that the same procedures had been followed by the Federal Bureau of Investigation for many years without undue burdens upon its law inforcement mission. 384 U.S. at 483-86.

administrative regulations are not to be given the same effect as laws passed by the legislature. This reasoning simplistically assumes that differences in the abstract stature of two governmental bodies necessarily yield differences in the import of the power they exercise. It is precisely this equation that the *Accardi* doctrine nullifies. In every relevant aspect, exercises of legislative rule-making power by administrative agencies have the same force and effect as enactments of Congress.

To those from the Government commands obedience, it is plainly immaterial whether the sovereign command is expressed by an agency or a legislature. Even criminal sanctions may be imposed for violating an administratively developed standard promulgated to give specific content to a broad enactment of Congress. *See, e.g., United States v. Grimaud*, 220 U.S. 506, 515-17, 520-21 (1911). In such cases, the law regards the legislature authorizing the administrative standard, rather than the agency itself, as the source of infliction of criminal punishment. The decisions condemning vagueness and standardless enforcement of the law in both legislative and administrative rules[22] demonstrate that the obligations of the government, like the obligations of private citizens, do not vary according to whether a law is legislatively or administratively derived. Accommodations between federal law and state law under the Supremacy Clause are arrived at in the same fashion irrespective of whether the potentially conflicting laws result from exercises of legislative or administrative power.

22. *E.g., G.M. Leasing Corp. v. United States*, 429 U.S. 338, 356-57 (1977); *Soglin v. Kauffman*, 418 F.2d 163, 167-68 (7th Cir. 1969); *Holmes v. New York City Housing Authority*, 398 F.2d 262, 264-65 (2d Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir. 1964); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1139-40 (D.N.H. 1976). *See* pp. 10-12, *supra*.



*See, e.g., 515 Associates v. City of Newark*, 424 F. Supp. 984, 992 (D.N.J. 1977).

In exercising their powers of constitutional review, the courts invariably evaluate the challenged law in the light of administrative refinements corrective of constitutional defects in the legislation itself. In *California Bankers Assn. v. Shultz, supra*, for example, the Court considered whether the record-keeping requirements of the Bank Secrecy Act violated the Fourth and Fifth Amendments. The concurrences of Justices Powell and Blackmun, which were necessary to the judgment of the Court, rested squarely upon the narrowing effect of the implementing regulations. 416 U.S. at 78-79; *see United States v. Miller*, 425 U.S. 435, 444-45 n. 6 (1976). It is fair to say that Congress has delegated rule-making power to administrative agencies to take advantage of the possibilities for a more flexible response to the wide variety of circumstances addressed by government regulation and law enforcement. The legislature should not be made to choose between the flexibility of administrative standards and the desirability of carrying out its purposes through enactments that carry the force and effect of law. To deny administrative rules this force and effect is, ultimately, to frustrate Congress's effort to avail itself of this flexibility by delegations of rule-making power to administrative agencies.

The Government's suggestion that the Court regard administrative rules less seriously than legislative enactments is particularly inappropriate with respect to the IRS regulations at issue here, because it is apparent that the regulations were adopted to stand in the place of Congressional action. When the Internal Revenue Service adopted these regulations in 1967, Congress was investigating the need for legislation to curtail the use of electronic eavesdropping

equipment. In reporting to Congress on the development of the regulations, the Commissioner of Internal Revenue expressed his expectation that the Congress would consider the new procedures in evaluating whether legislation was necessary. Stand. Fed. Tax Rep. CCH ¶ 6711 at 71,757 (1967) (Resp. App. at 28); S.Res. 39 Hearings, *supra,* at 1124 (Part 3). The Omnibus Crime Control & Safe Streets Act of 1968 followed closely upon the announcement of the Internal Revenue Service regulations and the broader scheme of Justice Department control over electronic eavesdropping by various federal agencies. Even after the passage of the 1968 Act, interest in more restrictive measures to control electronic eavesdropping persisted. Weekly Comp. of Pres. Doc., June 24, 1968 at 982-83. Against the background of proposals to outlaw consensual eavesdropping without either a judicial warrant or the consent of *all* the parties to a communication,[23] the Internal Revenue Service has continued to take the position that its regulations obviate the need for legislative action. Oversight Hearings into the Operations of the IRS: Hearings Before a Subcomm. of the House Comm. on Government Operations, 94th Cong., 1st Sess. 401, 448-50, 455 (1975) ("IRS Government Operations Hearings"). *See generally Morton v. Ruiz, supra,* 415 U.S. at 213-29; *Service v. Dulles, supra,* 354 U.S. at 377-78.

## II. EXCLUSION OF THE UNLAWFULLY ACQUIRED RECORDINGS IS THE APPROPRIATE REMEDY FOR THE AGENTS' DISREGARD FOR THE REQUIREMENTS OF DUE PROCESS.

The courts below correctly applied exclusionary sanctions in this case. Their rulings fully respect this Court's increas-

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23 *See* H.R. 10008, 93d Cong., 1st Sess. (1973); H.R. 9698, 93d Cong., 1st Sess. (1973); H.R. 9667, 93d Cong., 1st Sess. (1973).



ing emphasis on the need for assuring that particular applications of the exclusionary principle serve the deterrent purpose of the rule. The Government's assertion that the circumstances of this case call for an exception from generally applicable exclusionary doctrines is premised on both unwarranted alarm at the possibility of withdrawal of administrative safeguards and a view of the facts carefully considered and rejected by the courts below.

### A. Exclusion of Evidence Acquired in Violation of the Requirements of Administratively Determined Due Process Serves the Deterrent Purpose of the Exclusionary Rule.

Exclusion of evidence in federal criminal trials has been considered the appropriate judicial response to violations of constitutional rights by law enforcement officers for many decades. *Brown v. Illinois,* 422 U.S. 590, 599 (1975); *Weeks v. United States,* 232 U.S. 383 (1914). The impossibility of redressing constitutional injury after the fact, particularly the injury to privacy presented in search and seizure cases, has obliged the courts to rely upon exclusion of evidence as a means of preventing such injury from occurring in the first place. Thus the chief purpose of the exclusionary rule is to protect constitutional and other rights by deterring violations of such rights. *United States v. Calandra,* 414 U.S. 338, 347 (1974); *see United States v. Peltier,* 422 U.S. 531, 536-39 (1975). It is designed to prevent future violations by impressing upon law enforcement officers that unlawful conduct will not be rewarded. *United States v. Janis,* 428 U.S. 433, 446 (1976).

Because the ultimate objective of investigations that have the potential for intrusions against privacy generally is a judgment of conviction, the courts have expected that "the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." *Stone v. Powell,*

428 U.S. 465, 492 (1976). In decisions refining the scope of the rule over many years, this Court has repeatedly affirmed its confidence in the deterrent value of the basic exclusionary principle. *See Franks v. Delaware*, .... U.S. ...., 57 L.Ed. 2d 667, 681-82 (1978); *Terry v. Ohio, supra,* 392 U.S. at 12; *Elkins v. United States, supra,* 364 U.S. at 217. Although the courts' reluctance to give judicial sanction to unlawful conduct has also continued to influence interpretation of the exclusionary rule, *see, e.g., Brown v. Illinois, supra,* 422 U.S. at 611 (Powell, J., concurring), this Court has recognized that concern for judicial integrity ultimately must be expressed in efforts to affect the behavior of law enforcement officers in the future. *E.g., United States v. Janis, supra,* 428 U.S. at 458-59 n. 35. If law enforcement officers are punished for failing to anticipate precisely judicial perceptions of good procedure and good judgment, deterrence will not be achieved. The police inevitably will abandon as futile any effort to conform their conduct to constitutional and legal standards. The deterrent impact of the exclusionary rule depends entirely upon the ability of law enforcement officers largely untrained in constitutional law to receive and understand the judicial message conveyed by the exclusionary sanction. *See United States v. Janis, supra,* 428 U.S. at 448. It is critical, therefore, that evidence be excluded only where the courts can speak with clarity and simplicity in condemning violations of constitutional rights.

It is difficult to conceive of a clearer, simpler medium for reaching law enforcement officers than their own agency's rules of conduct. In this case the lower courts have neither rebuked the agents for failing to anticipate refinements in judicial interpretations, *see United States v. Peltier, supra,* nor engaged in second-guessing of difficult, on-the-spot judgments. *Cf. Spinelli v. United States,* 393 U.S. 410, 438



(1969) (Fortas, J., dissenting); *United States v. Acosta,* 501 F.2d 1330, 1335 (5th Cir. 1974) (Gee, J., dissenting), *mod. en banc* 509 F.2d 539 (1975). They have only enforced the very code of conduct that IRS enforcement personnel are continually told to learn, review, and respect. Here the message to the agents—that if their agency's procedures are not honored, the courts will not honor in a criminal trial any evidence obtained by violating those regulations—is as clear and simple as the rules themselves.

This Court's increasing awareness that this need for clarity and simplicity places limits on the deterrent effect of excluding evidence has led it to decline to apply the rule where the connection between wrongful conduct and judicial sanctions is attenuated. In *United States v. Calandra, supra,* the Court refused to permit a grand jury witness to invoke the exclusionary rule to preclude questions relating to documents obtained in violation of the Fourth Amendment. The "incremental deterrent effect" of exclusionary sanctions was judged insignificant because "the incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." 414 U.S. at 351. The same reasoning led the Court to refuse to apply the exclusionary rule to federal habeas corpus petitions raising search and seizure claims already considered on direct appeal. The Court determined that law enforcement officers would be unlikely to assume that a violation would escape review at trial and upon appeal, but would be detected by collateral review. *Stone v. Powell, supra,* 428 U.S. at 492. Nor, as the Court concluded in *United States v. Janis, supra,* could law enforcement officers be expected to assume that misconduct might not be punished in a criminal

trial yet would lead to exclusionary sanctions in related civil litigation.

In these cases the Court has refused to extend the exclusionary rule to fora other than trials of criminal cases. The results of these refinements in the exclusionary principle has been to confine the rule to the sphere in which it is most effective. The Court has made it clear, however, that these developments do not disturb the fundamental place of the sanction in cases, like this one, where the Government seeks to base a criminal conviction upon evidence its agents have acquired unlawfully. The lower courts' application of the exclusionary rule here cannot be overturned without embracing the far-reaching proposition unsuccessfully offered by the Government in *Franks v. Delaware, supra,* ..... U.S. ....., 57 L.Ed.2d at 679: that "interfering with a criminal conviction in order to deter official misconduct is a burden too great to impose on society."[24] *See United States v. Calandra, supra,* 414 U.S. at 348; *United States v. Janis, supra,* 428 U.S. at 453. To abandon this most direct and important application of the exclusionary rule would be particularly inappropriate here, in light of the unusual clarity and simplicity of the message conveyed to investiga-

24. The Government notes (Gov. Br. at 37 n. 19) that the exclusionary rule can be a blunt instrument. As it concedes, however, (Gov. Br. at 38), the measure of the sanction imposed in this case is tailored precisely to the contours of the violation committed: absent other defects in admissibility, the live testimony of a law enforcement officer who participated in a conversation during which consensual monitoring or eavesdropping occurred may be received in evidence. The Government is deprived not of its prosecution *per se,* but only of that which it acquired unlawfully. The admissibility of Agent Yee's version of the taped conversations, of course, is not at issue on this appeal. Respondent's suppression motion was directed solely at the tape recordings. Whether, as the Government presumes, Agent Yee may so testify must await inquiry at trial into any overreaching, deception, or other improprieties in his dealings with Dr. Caceres that may taint his testimony.



tive agents where the courts enforce administratively adopted standards, rather than judicial perceptions of the constitutional requirements.

### B. There Are No Special Circumstances Warranting Relief from Application of the Exclusionary Rule in This Case.

The Government argues (Gov. Br. at 39) that if evidence acquired in violation of agency regulations is excluded, the agencies will repeal their rules. Taking at face value the expressions of grave concern the IRS has repeatedly communicated to Congressional committees concerning violations of its regulations, it must be assumed that the agency will not abandon its standards lightly. Moreover, if the Government is correct in its assertion (Gov. Br. at 22-23, n. 5) that cost control and other efficiency considerations are an important purpose served by the regulations, the IRS can be expected to be particularly reluctant to relinquish control over use of electronic eavesdropping and monitoring equipment by enforcement-level agents.

There is certainly no support in the history of these and similar regulations for the idea that federal agencies will forsake their rules if the courts enforce them. Judicial enforcement of agency procedures applied in the agencies' own adjudicative settings, of course, is not new. The courts have never hesitated to hold agencies bound by such rules out of fear that the agencies might conclude that less process is due. The IRS's regulations requiring *Miranda* warnings in noncustodial settings were adopted in 1967. They have remained in effect from the time of the exclusionary decisions of the First, Fourth and Ninth Circuits in *United States v. Heffner, supra, United States v. Leahey, supra,* and *United States v. Sourapas, supra,* to the present day. In the wake of the Second Circuit's exclusion of evidence on the basis of noncompliance with the prosecutorial custom of informing grand jury witnesses of their "target"

status, restraints have actually been strengthened. After *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. granted* 431 U.S. 937 (1977), *cert. dismissed as improvidently granted*, 98 S.Ct. 1873 (1978), the unwritten custom of warning grand jury targets apparently was incorporated into the United States Attorneys Manual. *See* Transcript of Oral Argument before this Court in Case No. 76-1193 at 23. Finally, the Ninth Circuit's decision in this case has been controlling authority for over two years, and during that period the regulations governing electronic eavesdropping and monitoring have remained substantially unchanged.

The idea that law enforcement agencies will withdraw procedural safeguards if confronted with exclusionary sanctions necessarily rests upon the assumption that the application of the exclusionary rule will result in the loss of a substantial amount of probative evidence. If the Government is correct in its assertion (Gov. Br. at 37) that the agency's disciplinary powers are an effective deterrent to violations of agency regulations, such losses will not occur, because the misconduct that would evoke the sanction would occur only rarely. If internal agency discipline is ineffective, the sanction of the exclusionary rule will result in very little loss of probative evidence so long as application of the rule has the desired deterrent effect: once again, violations will be rare. As discussed above, the deterring message of the exclusionary sanction is strongest, because it is simple and clear, when expressed through an agency's own code of conduct. The Court has recognized the inherent difficulties in adducing reliable and empirical evidence concerning the impact of the exclusionary rule, *United States v. Janis*, *supra*, 428 U.S. at 432, and disciplinary measures suffer from the same problems of proof. If the Government is correct in asserting the effectiveness of disciplinary



measures, the consequence of applying the exclusionary rule is merely to create a redundant sanction. On the other hand, if disciplinary measures are ineffective, the consequence of refusing to apply the exclusionary rule would be the absence of any deterrent protection against unlawful conduct.[25]

It should not be assumed, in any event, that modification of agency regulations because of the threat of exclusionary sanctions would be undesirable. If an agency cannot consistently meet a standard that it has ordered its agents to respect strictly, the standard should be changed. Policies that an agency regards as desirable but too demanding to be respected in every case can be expressed in precatory terms. *Cf. United States v. Walden*, *supra*; *United States v. Atlantic Richfield*, 297 F. Supp. 1061, 1072-73 (S.D.N.Y. 1969). The difference between precatory and mandatory standards is not merely a matter of language. As noted

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25. The Government's suggestion that IRS disciplinary measures eliminate the need for exclusionary sanctions is unrealistic. The unlimited discretion of law enforcement agencies over whether disciplinary measures should be taken renders such measures inherently inadequate. They lack the essential characteristic of any judicially cognizable remedy, in that they cannot be invoked by persons aggrieved by unauthorized intrusions against privacy. This Court has consistently recognized that disciplinary measures are not a proper substitute for the protection of constitutional rights afforded by exclusionary sanctions. *Franks v. Delaware*, *supra*, .... U.S. ...., 57 L.Ed.2d at 680-81; *Lee v. Florida*, 392 U.S. 378, 386-87 (1968); *United States v. Leahey*, *supra*, 434 F.2d at 10. Although the Government characterizes the exclusionary rule as a blunt instrument, that criticism applies with even greater force to disciplinary measures. Dismissal, the only disciplinary step likely to have a significant deterrent impact, is a drastic, irreversible sanction. To expect an agency to dismiss skilled, expensively trained investigative personnel, and thus to incur the dampening of morale certain to result from personally rebuking and punishing an investigator for being too aggressive, is unrealistic. The exclusionary sanction, on the other hand, punishes a single transgression by a single and equivalent penalty. In any event, the IRS's record of imposing disciplinary sanctions for violation of its electronic eavesdropping and monitoring rules has not been impressive. S.Res. 39 Hearings *supra*, at 1526-30 (Part 3), 1546-47 (Part 3), 2210-13 (Part 5); IRS Government Operations Hearings, *supra*, at 450-55.

above, agency regulations often stand in the place of legislative action. Curtailment of administrative restrictions on investigative conduct may, in particular cases, prompt a legislative reaction. To determine whether legislative controls are appropriate, Congress is entitled to clear expression of existing administrative restraints. An agency's written rules should reflect its enforcement practices. If it is not reasonable to bring the agency's practices into conformity with its rules, then the rules should be relaxed to require only what is reasonable in practice. *See Marshall v. Barlow's, supra,* —— U.S. ——, 56 L.Ed 2d at 315-16.

The Government has described the violations of agency regulations at issue here as isolated, technical, inadvertent, "harmless,"[26] and committed in "good faith"; and therefore inappropriate for the application of exclusionary sanctions (Gov. Br. 34-37). The assertion that violations of the IRS Manual are not widespread is unsupported. The Government introduced no evidence on that issue at the suppression hearing. In fact there is substantial evidence that investigative misconduct has continued to be a problem within the IRS after the adoption of regulations on electronic eavesdropping and monitoring, along with regulations on other investigative activities, in 1967. In 1974 the IRS conducted a special one-week audit of electronic eavesdropping and monitoring within the Intelligence Division during the previous year. IRS Government Operations Hearings, *supra, at* 398-413. Review of the available records

26. The Government has argued that the wrongdoing of the agents on January 31 and February 6 was at best a variant of "harmless error" because the agents subsequently obtained permission to monitor and eavesdrop during the February 11 conversation. This Court rejected that argument under the same circumstances in *United States v. Giordano, supra,* 416 U.S. at 533; *see United States v. King, supra,* 478 F.2d at 505. Moreover, here the request for authorization contained a misrepresentation.



in various IRS field offices showed that twenty requests for authorization to conduct in-person electronic eavesdropping or monitoring were submitted to the Attorney General by the Intelligence Division during that period. During the same period, eighteen Special Agents were involved in thirty-five to forty instances of improper in-person or telephonic eavesdropping or monitoring. Some of these instance included more than one communication; one instance included twenty different phone calls. *Id.* at 426-31. The special audit also revealed substantial noncompliance with the inventorying and record-keeping regulations governing electronic eavesdropping and monitoring equipment. For example, IRS National Office records showed twenty-eight induction coils (for use in telephonic eavesdropping and monitoring) on hand within the agency, but the special audit discovered fifty-seven such devices in IRS field offices. *Id.* at 430. The report summarizing this special audit concluded that

> Due to the fact that the inventory of electronic surveillance devices has been incorrect, and due to the unauthorized and unreported use of these devices, the annual reports to the Attorney General have been inaccurate.

*Id.* at 431. The agency has also had difficulty preventing improper collection and retention of non-tax-related information by investigative agents. Legislative oversight hearings in 1975 focused in part upon "Operation Leprechaun" and "Operation Sunshine", in which IRS agents gathered and placed into the agency's Information Gathering and Retrieval System non-tax-related information on the social habits and private lives of local political figures in Miami, Florida. Internal Revenue Service Intelligence Operations:

Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 94th Cong., 1st Sess. 45-47, 541-68, 656, 666-69 (1975) ("IRS Ways and Means Hearings").

Respondent does not take issue with the Government's view that the exclusionary rule should not be applied where violations are merely technical or inadvertent. The Government's characterization of the events on which the courts below based their rulings, however, is inaccurate. The facts have been set forth elsewhere in this brief and do not require repetition here. The district court found the violations to be substantial. That finding is supported by repeated, unexcused, and largely unexplained misconduct by the agents. No reasons have been offered for the agent's failure to seek authorization during the ten-month hiatus in the investigation; for the failure to seek authorization between the time of Agent Yee's January 27, 1975 meeting and the eavesdropping conducted on January 31; for the scheduling of immediate meetings precluding timely authorization requests, despite the conceded lack of any necessity for doing so;[27] for the failure to process

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27. Agent Yee's January 30 conversation with Dr. Caceres clearly shows his control over the timing of their meetings:

"YEE: Dr. Caceres?

"CACERES: Yes; how are you?

"YEE: Not bad. Yourself?

"CACERES: Fine, thank you. You just caught me in.

"YEE: Yeah, I've been trying to get ahold of you this afternoon.

"CACERES: I'm a little bit out of breath.

"YEE: Oh, well; ah say, I've been considering the case and ah what we've been talking about this week and ah maybe I could be a, have a little bit more latitude on, on the time factor but uhm I want to meet with you ah tomorrow and discuss ah these things.

"CACERES: All right. Well, I'll arrange my schedule to your convenience."

(A. 14-15)



the January 31 authorization request for over a week; or for the misrepresentation made to the Attorney General in the written authorization request submitted on February 10, which recited that Dr. Caceres initiated the meetings with Agent Yee (A. 78). The Ninth Circuit sustained the district court's findings and later described the agents' conduct as "intentional circumvention of administrative regulations." *United States v. Choate*, 576 F.2d 165, 173 (9th Cir. 1978).[28]

The Government's claim of good faith must be evaluated in light of the agents' presumably intimate familiarity with the required procedures. When abuses of electronic eavesdropping and monitoring within the IRS were discovered in 1965, directives were issued to investigative personnel emphasizing the need for strict compliance with IRS policies on privacy. S.Res. 39 Hearings, *supra*, at 1126-27 (Part 3), S.928 Hearings, *supra*, at 30-32. Meetings were held to acquaint IRS personnel with the procedures adopted in 1967. Stand. Fed. Tax Rep. (CCH) ¶ 6711 at 71,756 (1967) (Resp. App. at 27). The agency's regulations on electronic eavesdropping and monitoring are explained to new investigative agents as part of their orientation, and reviews of IRS policy on eavesdropping and monitoring are frequent. IRS Government Operations Hearings, *supra*, at 411, 448; Internal Revenue Manual ¶ 9389.9 (requiring semi-annual reviews of eavesdropping and monitoring policies with all IRS technical personnel). An information notice calling special attention to the restrictions on elec-

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28. The ample support for these findings also renders unnecessary any rebuttal to the Government's extensive argument (Gov. Br. at 16-17 n. 4) that no violation of the regulations occurred. As the Government acknowledges, the correctness of the findings below is not at issue in this Court.

tronic eavesdropping and monitoring and directing field offices to hold meetings to discuss the restrictions with all IRS employees was distributed on March 25, 1974—just four days after the first conversation electronically monitored during the investigation of this case. IRS Government Operations Hearings, *supra*, at 410, 452. Under these circumstances the Government has no legitimate claim to any "good faith" exception from exclusionary rule sanctions. *See Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

## III. THE SUPERVISORY POWER OF THE FEDERAL COURTS PROVIDES AN ALTERNATIVE BASIS FOR EXCLUSION OF THE RECORDINGS.

The decisions of the Ninth, First, and Fourth Circuits in *United States v. Sourapas, supra, United States v. Leahey, supra*, and *United States v. Heffner, supra*, relied on by the lower courts in this case, rested upon due process principles. The district court and the court of appeals also could have based their decisions on their supervisory power had they not regarded these authorities as controlling. If the Court were to conclude that exclusion of the recordings cannot be sustained on the constitutional basis relied on by the court of appeals, this case should be remanded to the district court to consider whether a discretionary exercise of its supervisory power is appropriate.

The Government does not contend, of course, that the federal courts have no supervisory power, or that such power cannot be exercised in criminal cases. *Hampton v. United States*, 425 U.S. 484, 491-95 (1976) (Powell, J. and Blackmun, J. concurring); *Rea v. United States*, 350 U.S. 214 (1956); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957); *Burton v. United States*, 483 F.2d 1182 (9th Cir. 1973)



*and cases cited therein.* The Government argues that under the circumstances of this case, an exercise of supervisory power to exclude evidence would be in derogation of limitations Congress has placed upon this power and, even absent such limitations, could not be supported by evidence of sufficiently serious misconduct.[29] The enactments relied on by the Government do not affect the supervisory power of the federal courts, and the conduct of the agents provides ample evidence to warrant further factual inquiry by the district court.

A federal statute dealing with confessions (18 U.S.C. § 3501 (1968)) and Rule 402 of the Federal Rules of Evidence are offered by the Government to show that the exercise of supervisory power in this case is contrary to the expressed will of Congress. Section 3501, however, confers no special evidentiary dignity upon confessions or other purportedly inculpatory statements. Its purpose is to make voluntariness the test of admissibility of confessions, so as to avoid exclusion of such statements solely on the basis of delay in arraignment. *See United States v. Halbert*, 436 F.2d 1226, 1231-34 (9th Cir. 1970); 1968 U.S. Code Cong. & Ad. News 2112, 2124-25. Rule 402 merely restates the familiar principle that relevant evidence not otherwise improper is admissible. As the Second Circuit noted in *United States v. Jacobs, supra*, 547 F.2d at 777, the Government has cited no authority for its extreme interpretation of Rule 402, and specifically no authority for the

29. The Government also criticizes the exercise of supervisory power by the courts over the actions of other branches of government. (Gov. Br. at 41, 43 n. 25). This criticism is a reiteration of the idea that the courts should not impose judicial perceptions of proper law enforcement practice upon the Executive Branch except in compelling cases. *Cf. United States v. Russell*, 411 U.S. 423, 435 (1973). Although undoubtedly a wise admonition, there can be no rational claim of judicial overreaching where the Executive Branch itself has set the standards.

idea that Congress, in enacting the rule, "was concerning itself with the supervisory powers of the federal courts," which have "inherent power to refuse to receive material evidence" in a proper case. *Lopez v. United States, supra,* 373 U.S. at 440.

There are no hard and fast rules for determining what constitutes a proper case for an exercise of supervisory power. *See United States v. Narciso,* 446 F. Supp. 252, 302 (E.D. Mich. 1977). In *Lopez v. United States, supra,* 373 U.S. at 440 the Court suggested that such exercises should be limited to cases in which "manifestly improper conduct" has occurred. Although the Court found no improper conduct in that case, it noted that such a finding could be premised upon a violation of a statute or "rule of procedure". *Id.; see Mallory v. United States,* 354 U.S. 449 (1957). The value preserved by exercising supervisory power is the maintenance of "civilized standards of procedure and evidence." *McNabb v. United States,* 318 U.S. 332, 340-41 (1943). Therefore the use of supervisory power should be confined to the enforcement and upholding of standards protective of important interests. Moreover, because the remedy through which supervisory power is to be exercised is usually an exclusionary order, the considerations of deterrence which underlie the exclusionary rule require that supervisory power be exercised only where the violation of an investigative standard is a substantial one.

The circumstances of this case satisfy these preconditions to the exercise of supervisory power. As demonstrated above, the investigative standards at issue here were created to protect privacy. The agents' misconduct in violating these standards was serious and substantial. During the ten-month hiatus between the initial allegation of bribery and the events at issue in this case, they made no effort to obtain



authorization for electronic eavesdropping. They waited an additional four days after the last of the events referred to in the application for authorization eventually submitted. That submission occurred only after the agents had themselves scheduled a meeting without sufficient advance notice to permit proper processing of the application—despite the conceded willingness of the taxpayer to conform to their schedules and the absence of any reason for haste. During the ensuing week after the first eavesdropping incident, the agents did nothing to follow up on their application. Higher officials within the agency did nothing to process the application for reasons the Government has never explained. The application eventually submitted to the Justice Department contained a statement by the investigative agents made either with knowledge of its falsity or in reckless disregard of the truth. *See United States v. Luna,* 525 F.2d 4 (6th Cir. 1975), *cert. denied* 424 U.S. 965 (1976).

The exercise of supervisory power is a matter for the trial court's discretion, abuse of which may be corrected by the appellate courts. *United States v. Fields,* 1978 CCH Fed. Sec. L. Rep. ¶ 96,552 at 94, 272 (2d Cir. 1978); *United States v. Rodman,* 519 F.2d 1058 (1st Cir. 1975); *see* Brief of the United States in *United States v. Jacobs,* No. 76-1193 at 73 (October Term 1977). The foregoing facts provide a clear predicate for further factual inquiry by the trial court to aid in its exercise of discretion.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MORRISON & FOERSTER
JAMES J. BROSNAHAN
LINDA E. SHOSTAK
H. PRESTON MOORE, JR.

November 1978.

## *Appendix*

PREPARED STATEMENT OF HON. EDWARD H. LEVI,
ATTORNEY GENERAL OF THE UNITED STATES
Before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities,
November 6, 1975

In: Electronic Surveillance within the United States for Foreign Intelligence Purposes: Hearings before the Subcommittee on Intelligence and the Rights of Americans of the Select Committee on Intelligence of the United States Senate, 94th Cong., 2nd Sess. on S. 3197, The Foreign Intelligence Surveillance Act of 1976, June 29, July 1, August 6, 10 and 24, 1976.

As I read the history, going back to 1931 and undoubtedly prior to that time, except for an interlude between 1928 and 1931, and for two months in 1940, the policy of the Department of Justice has been that electronic surveillance could be employed without a warrant in certain circumstances.

In 1928 the Supreme Court in *Olmstead v. United States* held that wiretapping was not within the coverage of the Fourth Amendment. Attorney General Sargent had issued an order earlier in the same year prohibiting what was then known as the Bureau of Investigation from engaging in any telephone wiretapping for any reason. Soon after the order was issued, the Prohibition Unit was transferred to the Department as a new bureau. Because of the nature of its work and the fact that the Unit had previously engaged in telephone wiretapping, in January 1931, Attorney General William D. Mitchell directed that a study be made to determine whether telephone wiretapping should be permitted and, if so, under what circumstances. The Attorney General determined that in the meantime the bureaus within

the Department could engage in telephone wiretapping upon the personal approval of the bureau chief after consultation with the Assistant Attorney General in charge of the case. The policy during this period was to allow wiretapping only with respect to the telephones of syndicated bootleggers, where the agent had probable cause to believe the telephone was being used for liquor operations. The bureaus were instructed not to tap telephones of public officials and other persons not directly engaged in the liquor business. In December 1931, Attorney General William Mitchell expanded the previous authority to include "exceptional cases where the crimes are substantial and serious, and the necessity is great and [the bureau chief and the Assistant Attorney General] are satisfied that the persons whose wires are to be tapped are of the criminal type."

During the rest of the thirties it appears that the Department's policy concerning telephone wiretapping generally conformed to the guidelines adopted by Attorney General William Mitchell. Telephone wiretapping was limited to cases involving the safety of the victim (as in kidnappings), location and apprehension of "desperate" criminals, and other cases considered to be of major law enforcement importance, such as espionage and sabotage.

In December 1937, however, in the first *Nardone* case the United States Supreme Court reversed the Court of Appeals for the Second Circuit, and applied Section 605 of the Federal Communications Act of 1934 to law enforcement officers, thus rejecting the Department's argument that it did not so apply. Although the Court read the Act to cover only wire interceptions where there had been disclosure in court or to the public, the decision undoubtedly had its impact upon the Department's estimation of the value of telephone wiretapping as an investigative technique. In the



second *Nardone* case in December 1939, the Act was read to bar the use in court not only of the overhead [sic] evidence, but also of the fruits of that evidence. Possibly for this reason, and also because of public concern over telephone wiretapping, on March 15, 1940, Attorney General Robert Jackson imposed a total ban on its use by the Department. This ban lasted about two months.

On May 21, 1940, President Franklin Roosevelt issued a memorandum to the Attorney General stating his view that electronic surveillance would be proper under the Constitution where "grave matters involving defense of the nation" were involved. The President authorized and directed the Attorney General "to secure information by listening devices [directed at] the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies." The Attorney General was requested "to limit these investigations so conducted to a minimum and to limit them insofar as possible as to aliens." Although the President's memorandum did not use the term "trespassory microphone surveillance," the language was sufficiently broad to include that practice, and the Department construed it as an authorization to conduct trespassory microphone surveillances as well as telephone wiretapping in national security cases. The authority for the President's action was later confirmed by an opinion by Assistant Solicitor General Charles Fahy who advised the Attorney General that electronic surveillance could be conducted where matters affected the security of the nation.

On July 17, 1946, Attorney General Tom C. Clark sent President Truman a letter reminding him that President Roosevelt had authorized and directed Attorney General Jackson to approve "listening devices [directed at] the con-

versation of [sic] other communications of persons suspected of subservise activities against the Government of the United States, including suspected spies" and that the directive had been followed by Attorneys General Robert Jackson and Francis Biddle. Attorney General Clark recommended that the directive "be continued in force" in view of the "increase in subversive activities" and "a very substantial increase in crime." He stated that it was imperative to use such techniques "in cases vitally affecting the domestic security, or where human life is in jeopardy" and that Department files indicated that his two most recent predecessors as Attorney General would concur in this view. President Truman signed his concurrence on the Attorney General's letter.

According to the Department's records, the annual total of telephone wiretaps and microphones installed by the Bureau between 1940 through 1951 was as follows:

| Telephone wiretaps: | | Microphones: | |
|---|---|---|---|
| 1940 | 6 | 1940 | 6 |
| 1941 | 67 | 1941 | 25 |
| 1942 | 304 | 1942 | 88 |
| 1943 | 475 | 1943 | 193 |
| 1944 | 517 | 1944 | 198 |
| 1945 | 519 | 1945 | 186 |
| 1946 | 364 | 1946 | 84 |
| 1947 | 374 | 1947 | 81 |
| 1948 | 416 | 1948 | 67 |
| 1949 | 471 | 1949 | 75 |
| 1950 | 270 | 1950 | 61 |
| 1951 | 285 | 1951 | 75 |

It should be understood that these figures, as in the case for the figures I have given before, are cumulative for each year and also duplicative to some extent, since a telephone wiretap or microphone which was installed, then discontinued, but later reinstated would be counted as a new action upon reinstatement.



In 1952, there were 285 telephone wiretaps, 300 in 1953, and 322 in 1954. Between February 1952 and May 1954, the Department's position was not to authorize trespassory microphone surveillance. This was the position taken by Attorney General McGrath, who informed the FBI that he would not approve the installation of trespassory microphone surveillance because of his concern over a possible violation of the Fourth Amendment. FBI records indicate there were 99 installed in 1954. The policy against Attorney General approval, at least in general, of trespassory microphone surveillance was reversed by Attorney General Herbert Brownell on May 20, 1954, in a memorandum to Director Hoover instructing him that the Bureau was authorized to conduct trespassory microphone surveillances. The Attorney General stated that "considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest."

A memorandum from Director Hoover to the Deputy Attorney General on May 4, 1961, described the Bureau's practice since 1954 as follows: "[I]n the internal security field, we are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activities of Soviet intelligence agents and Communist Party leaders. In the interests of national safety, microphone surveillances are also utilized on a restricted basis, even though trespass is necessary, in uncovering major criminal activities. We are using such coverage in connection with our investigations of the clandestine activities of top hoodlums and organized crime. From an intelligence standpoint, this investigative technique has produced results unobtainable through other means. The information so obtained is treated in the same manner as

information obtained from wiretaps, that is, not from the standpoint of evidentiary value but for intelligence purposes."

[at pp. 23-25]

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The law has not lost its inventiveness, and it might be possible to fashion new judicial approaches to the novel situations that come up in the area of foreign intelligence. I think it must be pointed out that for the development of such an extended, new kind of warrant, a statutory base might be required or at least appropriate. At the same time, in dealing with this area, it may be mistaken to focus on the warrant requirement alone to the exclusion of other, possibly more realistic, protections.

What, then, is the shape of the present law? To begin with, several statutes appear to recognize that the Government does intercept certain messages for foreign intelligence purpose and that this activity must be, and can be, carried out. Section 952 of Title 18, which I mentioned earlier is one example; section 798 of the same title is another. In addition, Title III's proviso, which I have quoted earlier, explicitly disclaimed any intent to limit the authority of the Executive to conduct electronic surveillance for national security and foreign intelligence purposes. In an apparent recognition that the power would be exercized, Title III specifies the conditions under which information obtained through Presidentially authorized surveillance may be received into evidence. It seems clear, therefore, that in 1968 Congress was not prepared to come to a judgment that the Executive should discontinue its activities in this area, nor was it prepared to regulate how those activities were to be conducted. Yet it cannot be said that Congress has been entirely silent on this matter. Its express statutory



references to the existence of the activity must be taken into account.

The case law, although unsatisfactory in some respects, has supported or left untouched the policy of the Executive in the foreign intelligence area whenever the issue has been squarely confronted. The Supreme Court's decision in the *Keith* case in 1972 concerned the legality of warrantless surveillance directed against a domestic organization with no connection to a foreign power and the Government's attempt to introduce the product of the surveillance as evidence in the criminal trial of a person charged with bombing a C.I.A. office in Ann Arbor, Michigan. In part because of the danger that uncontrolled discretion might result in use of electronic surveillance to deter domestic organizations from exercising First Amendment rights, the Supreme Court held that in cases of internal security, when there is no foreign involvement, a judicial warrant is required. Speaking for the Court, Justice Powell emphasized that "this case involves only the domestic aspects of national security". We have expressed no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents.

As I observed in my remarks at the ABA convention, the Supreme Court surely realized, "in view of the importance the Government has placed on the need for warrantless electronic surveillance that, after the holding in *Keith*, the Government would proceed with the procedures it had developed to conduct those surveillances not prohibited—that is, in the foreign intelligence area or, as Justice Powell said, 'with respect to activities of foreign powers and their agents.'"

The two federal circuit court decisions after *Keith* that have expressly addressed the problem have both held that

the Fourth Amendment does not require a warrant for electronic surveillance instituted to obtain foreign intelligence. In the first, *United States v. Brown* the defendant, an American citizen, was incidentally overheard as the result of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes. In upholding the legality of the surveillance, the Court of Appeals for the Fifth Circuit declared that on the basis of "the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign affairs . . . the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence." The court added that "(r)estrictions on the President's power which are appropriate in cases of domestic security become inappropriate in the context of the international sphere."

In *United States v. Butenko* the Third Circuit reached the same conclusion—that the warrant requirement of the Fourth Amendment does not apply to electronic surveillance undertaken for foreign intelligence purposes. Although the surveillance in that case was directed at a foreign agent, the court held broadly that the warrantless surveillance would be lawful so long as the primary purpose was to obtain foreign intelligence information. The court stated that such surveillance would be reasonable without a warrant even though it might involve the overhearing of conversations of "alien officials and agents, and perhaps of American citizens." I should note that although the United States prevailed in the *Butenko* case, the Department acquiesced in the petitioner's application for *certiorari* in order to obtain the Supreme Court's ruling on the question. The Supreme Court denied review, however, and thus left



the Third Circuit's decision undisturbed as the prevailing law.

Most recently, in *Zweibon v. Mitchell,* decided in June of this year, the District of Columbia Circuit dealt with warrantless electronic surveillance directed against a domestic organization allegedly engaged in activities affecting this country's relations with a foreign power. Judge Skelly Wright's opinion for four of the nine judges makes many statements questioning any national security exception to the warrant requirement. The court's actual holding made clear in Judge Wright's opinion was far narrower and, in fact, is consistent with holdings in *Brown* and *Butenko.* The court held only that "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power." This holding, I should add, was fully consistent with the Department of Justice's policy prior to the time of the *Zweibon* decision.

With these cases in mind, it is fair to say electronic surveillance conducted for foreign intelligence purposes, essential to the national security, is lawful under the Fourth Amendment, even in the absence of a warrant, at least where the subject of the surveillance is a foreign power or an agent or collaborator of a foreign power. Moreover, the opinions of two circuit courts stress the purpose for which the surveillance is undertaken, rather than the identity of the subject. This suggests that in their view such surveillance without a warrant is lawful so long as its purpose is to obtain foreign intelligence.

But the legality of the activity does not remove from the Executive or from Congress the responsibility to take steps, within their power, to seek an accommodation between the vital public and private interests involved. In our effort

to seek such an accommodation, the Department has adopted standards and procedures designed to ensure the reasonableness under the Fourth Amendment of electronic surveillance and to minimize to the extent practical the intrusion on individual interests. As I have stated, it is the Department's policy to authorize electronic surveillance for foreign intelligence purposes only when the subject is a foreign power or an agent of a foreign power. By the term "agent" I mean a conscious agent; the agency must be of a special kind and must relate to activities of great concern to the United States for foreign intelligence or counter intelligence reasons. In addition, at present, there is no warrantless electronic surveillance directed against any American citizen, and although it is conceivable that circumstances justifying such surveillance may arise in the future. I will not authorize the surveillance unless it is clear that the American citizen is an active, conscious agent or collaborator of a foreign power. In no event, of course, would I authorize any warrantless surveillance against domestic persons or organizations such as those involved in the *Keith* case. Surveillance without a warrant will not be conducted for purposes of security against domestic or internal threats. It is our policy, moreover, to use the Title III procedure whenever it is possible and appropriate to do so, although the statutory provisions regarding probable cause, notification, and prosecutive purpose make it unworkable in all foreign intelligence and many counterintelligence cases.

The standards and procedures that the Department has established within the United States seek to ensure that every request for surveillance receives thorough and impartial consideration before a decision is made whether to institute it. The process is elaborate and time-consuming,



but it is necessary if the public interest is to be served and individual rights safeguarded.

I have just been speaking about telephone wiretapping and microphone surveillances which are reviewed by the Attorney General. In the course of its investigation, the committee has become familiar with the more technologically sophisticated and complex electronic surveillance activities of other agencies. These surveillance activities present somewhat different legal questions. The communications conceivably might take place entirely outside the United States. That fact alone, of course, would not automatically remove the agencies' activities from scrutiny under the Fourth Amendment since at times even communications abroad may involve a legitimate privacy interest of American citizens. Other communications conceivably might be exclusively between foreign powers and their agents and involve no American terminal. In such a case, even though American citizens may be discussed, this may raise less significant, or perhaps no significant, questions under the Fourth Amendment. But the primary concern, I suppose, is whether reasonable minimization procedures are employed with respect to use and dissemination.

With respect to all electronic surveillance, whether conducted within the United States or abroad, it is essential that efforts be made to minimize as much as possible the extent of the intrusion. Much in this regard can be done by modern technology. Standards and procedures can be developed and effectively deployed to limit the scope of the intrusion and the use to which its product is put. Various mechanisms can provide a needed assurance to the American people that the activity is undertaken for legitimate foreign intelligence purposes, and not for political or other improper purposes. The procedures used should not

be ones which by indirection in fact target American citizens and resident aliens where these individuals would not themselves be appropriate targets. The proper minimization criteria can limit the activity to its justifiable and necessary scope.

Another factor must be recognized. It is the importance or potential importance of the information to be secured. The activity may be undertaken to obtain information deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.

Need is itself a matter of degree. It may be that the importance of some information is slight, but that may be impossible to gauge in advance; the significance of a single bit of information may become apparent only when joined to intelligence from other sources. In short, it is necessary to deal in probabilities. The importance of information gathered from foreign establishments and agents may be regarded generally as high—although even here there may be wide variations. At the same time, the effect on individual liberty and security—at least of American citizens—caused by methods directed exclusively to foreign agents, particularly with minimization procedures, would be very slight.

There may be regulatory and institutional devices other than the warrant requirement that would better assure that intrusions for national security and foreign intelligence purposes reasonably balance the important needs of Government and of individual interests. In assessing possible approaches to this problem it may be useful to examine the



practices of other Western democracies. For example, England, Canada, and West Germany each share our concern about the confidentiality of communications within their borders. Yet each recognizes the right of the Executive to intercept communications without a judicial warrant in cases involving suspected esponionage, subversion or other national security intelligence matters.

In Canada and West Germany, which have statutes analogous to Title III, the Executive in national security cases is exempt by statute from the requirement that judicial warrants be obtained to authorize surveillance of communications. In England, where judicial warrants are not required to authorize surveillance of communications in criminal investigations, the relevant statutes recognize an inherent authority in the Executive to authorize such surveillance in national security cases.[1] In each country, this authority is deemed to cover interception of mail and telegrams, as well as telephone conversations.

In all three countries, requests for national security surveillance may be made by the nation's intelligence agencies. In each, a Cabinet member is authorized to grant the request.

In England and West Germany, however, interception of communications is intended to be a last resort, used only when the information being sought is likely to be unobtainable by any other means. It is interesting to note, however, that both Canada and West Germany do require the Execu-

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1. Report of the Committee on Privy Councillors appointed to inquire into the interception of communications (1957), which states, at page 5, that, "The origin of the power to intercept communications can only be surmised, but the power has been exercised from very early times; and has been recognised as a lawful power by a succession of statutes covering the last 200 years or more."

tive to report periodically to the Legislature on its national security surveillance activities. In Canada, the Solicitor General files an annual report with the Parliament setting forth the number of national security surveillances initiated, their average length, a general description of the methods of interception or seizure used, and assessment of their utility.

It may be that we can draw on these practices of other Western democracies, with appropriate adjustments to fit our system of separation of powers. The procedures and standards that should govern the use of electronic methods of obtaining foreign intelligence and of guarding against foreign threats are matters of public policy and values. They are of critical concern to the Executive Branch and to Congress, as well as to the courts. The Fourth Amendment itself is a reflection of public policy and values—an evolving accommodation between governmental needs and the necessity of protecting individual security and rights. General public understanding of these problems is of paramount importance, to assure that neither the Executive, nor the Congress, nor the courts risk discounting the vital interests on both sides.

The problems are not simple. Evolving solutions probably will and should come—as they have in the past—from a combination of legislation, court decisions, and executive actions. The law in this area, as Lord Devlin once described the law of search in England, "is haphazard and ill defined." It recognized the existence and the necessity of the Executive's power. But the Executive and the Legislature are, as Lord Devlin also said, "expected to act reasonably." The future course of the law will depend on whether we can meet that obligation.

[at pp. 37-40]



**MANUAL**
**SUPPLEMENT**
**Department of The Treasury, Internal Revenue Service**

April 11, 1974 *Consensual Monitoring of Private Conversations in Criminal Investigations*

*Section 1. Purpose*

This Supplement implements Policy Statement P-9-35 (approved 10-26-73), and Department of Justice Guidelines on monitoring private conversations dated October 16, 1972.

*Section 2. Background*

The monitoring of conversations with the consent of one of the participants is an effective and reliable investigative technique but must be sparingly and carefully used. The Department of Justice has encouraged its use by criminal investigators where it is both appropriate and necessary to establish a criminal offense. While such monitoring is constitutionally and statutorily permissible, this investigative technique is subject to careful regulation in order to avoid any abuse or any unwarranted invasion of privacy.

*Section 3. Designated Officials*

.01 The monitoring of telephone conversations with the consent of one or all parties may be authorized by the Chief, Intelligence Division; the Assistant Regional Inspector (Internal Security); the Chief of the National Office Investigations Branch (Internal Security); the Chief of National Office Operations Branch (Intelligence); or in the absence of any of them, the person acting in his place. This authority cannot be redelegated.

.02 Other than in criminal investigations, the recording of telephone calls by use of mechanical, electronic or any other device is prohibited.

.03 The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Intelligence Division; the Director, Internal Security Division; or, in their absence, the Acting Directors. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. If the Director, Internal Security Division, or the Director, Intelligence Division, cannot be reached, the Assistant Commissioner (Inspection) or the Assistant Director, Intelligence Division, may grant emergency approval. This authority cannot be redelegated.

.04 There are no restrictions on any non-telephone monitoring when all parties to the conversation consent.

.05 The use of monitoring equipment as authorized by the designated officials in Section 3.01 and Section 3.03 above, is limited to Criminal Investigators (GS-1811 series) or to persons acting under the direction of Criminal Investigators. The prohibitions and limitations outlined in Policy Statement P-9-35 apply equally to Service personnel and to non-Service persons who act at the direction of Criminal Investigators.

.06 Monitoring of private conversations will be authorized only when, in the considered judgment of the designated official, such action is warranted and necessary to effective law enforcement.

*Section 4. Annual Reports*

The Assistant Commissioner (Inspection) shall submit to the Assistant Attorney General, Criminal Division, an annual report during July of each year containing: an inventory of all the Service's electronic and mechanical equipment designed for monitoring conversations; and a brief statement of the results obtained during the prior fiscal year by the use of such investigative monitoring.



*Section 5. Other Restrictions*

A device, such as a "pen register," designed solely to identify telephone numbers, may be employed only when authorized by an appropriate order in the nature of a search warrant under Rule 41, Federal Rules of Criminal Procedures. [sic]

*Section 6. Effect on Other Documents*

.01 This amends and supplements IRM 9383.5, 9453.2, MS CR 94G-34, dated July 10, 1967, and 682 of IRM (10)111, Instructional Handbook for Inspectors of the Internal Security Division. This also supplements IRM 9900, Handbook for Special Agents.

.02 The above "effect" should be annotated in pen and ink on the cited text and Supplement, with a reference to this Supplement.

DONALD C. ALEXANDER
*Commissioner*

Attachment: Policy Statement

## INTERNAL REVENUE MANUAL, PART X—INSPECTION

### 652.4

### Custody of Electronic Equipment

(1) Devices designed for consensual monitoring of conversations for investigative purposes will be stored as feasible, in one central location or in a limited number of locations, so as to facilitate administrative control. The equipment will be maintained in locked storage and will be accounted for at all times.

(2) The Regional Inspector and Chief, Investigations Branch, will designate one Inspector as an Equipment Custodian, with one or more alternates, to have the responsibility for custody and maintenance of investigative equipment in peak operating condition at all times. Consideration should be given to adjusting the Equipment Custodian's workload so he/she has available time for investigative equipment responsibilities. Access to investigative equipment should be limited to the Regional Inspector, the Assistant Regional Inspector (Internal Security), his/her Executive Assistant and the Equipment Custodian and alternate.

(3) The Equipment Custodian will maintain an inventory filing card record system listing on separate cards each piece of investigative equipment with accessories. Each card will contain a description of the equipment, name of manufacturer, model number, serial number, and date acquired or received by that office. When equipment is assigned to a post of duty, the regional Equipment Custodian will obtain a Form 1931, Transfer/Receipt of Personal Property, signed by the Equipment Custodian or property officer at that post of duty. The regional Equipment Custodian will then post on his/her inventory card the date and post of duty where the equipment is located. The Equipment Custodian at that post of duty should also prepare inventory



filing cards on equipment assigned to his or her office in the same manner as described above.

(4) The Equipment Custodian will obtain or complete a Form 1930, Custody Receipt for Government Property, for any equipment removed from locked storage by himself/herself or another Inspector. The Form 1930 can be attached to the inventory filing card to show the temporary custody of that equipment. This same procedure may be used while equipment is on temporary loan to another agency or while it is being repaired. Upon return of equipment that has been used for consensual monitoring or surveillance, the Equipment Custodian or case Inspector will designate on the reverse side of the Form 1930: the case title and number, the date equipment was returned, and a list of the specific dates on which the equipment was used. Equipment located at posts of duty will be accounted for in this same manner.

(5) Upon completion of each Form 1930 where consensual monitoring or surveillance has been conducted, the Form 1930 will then be forwarded to the Regional Inspector or Chief, Investigations Branch, where it will be attached to the related request Form 5177 or 5178 in his or her Use of Electronic Equipment file.

(6) When equipment has been signed out on Forms 1930 for loan to another agency, for repair, for preparing duplicate copies of previously made tapes, for other purposes not directly related to actual investigative monitoring activity, upon return of the equipment the Form 1930 may be discarded.

(7) On June 30 of each year, the Equipment Custodian will prepare a Form 1926-A, Personal Property Inventory Worksheet—Equipment, listing a complete inventory of investigative equipment assigned to the region or the Investigations Branch. This inventory will be forwarded to the

National Office. The Assistant Commissioner (Inspection) shall submit to the Assistant Attorney General, Criminal Division, an annual report during July of each year containing: an inventory of all the Service's electronic and mechanical equipment designed for monitoring conversations, and a brief statement of the results obtained during the prior fiscal year by the use of such investigative monitoring.



**IRS NEWS RELEASE NO. 890, JULY 13, 1967**

The Internal Revenue Service issued the following statement:

Commissioner of Internal Revenue, Sheldon S. Cohen, released the facts on the use of electronic devices by the three IRS criminal investigation units during the eight-year period from 1958 through 1966. The same data was sent to Senator Edward V. Long of Missouri, in a report.

Release of this data fulfills Mr. Cohen's promise to the Senate Subcommittee on Administrative Practice and Procedure that a detailed accounting would be made to Congress and the American public when all of the facts had been gathered and tabulated.

In his letter to Senator Long, Mr. Cohen reported findings of a special IRS inquiry board and listed measures taken to assure that improper uses of electronic surveillance equipment, such as occurred prior to July of 1965, "cannot recur within the Internal Revenue Service."

Statistics reflecting hundreds of thousands of criminal investigations in the eight-year period between 1958 and 1966 showed the use of 94 wiretaps, 32 "bugs", 29 phone booth installations, and 132 other types of installations using electronic devices.

Mr. Cohen emphasized that these figures included both legal and questionable installations. He also pointed out that instances of improper use occurred prior to July of 1965 and with most cases taking place four and five years ago.

The report also listed 723 uses of a "pen register" which records the number dialed but not the conversation. The Supreme Court has not ruled on this issue, but pen registers were generally considered legal until December 1966 when one Appellate Court for the first time ruled adversely.

The report to Senator Long confirmed earlier IRS statements that use of electronic devices occurred only in the investigation of criminal violations by racketeers, gamblers, moonshiners or persons attempting to suborn the integrity of the IRS.

Citing the findings of the special IRS board named to investigate possible improper uses of electronic equipment, Mr. Cohen said "the board found no evidence of use of electronic devices for surveillance purposes other than in cases where the individuals were engaged in criminal or illegal activities."

"The significance of this is that there is no indication of any spill-over to 'ordinary audit cases,'" Mr. Cohen said.

During the hearings conducted by the Long Subcommittee, repeated charges were made that (a) use of electronic devices was widespread and (b) that they were used in connection with the routine investigations of ordinary taxpayers. The IRS report indicated these charges were unfounded.

Although the hearings focused on the IRS Intelligence Division which investigates gambling and other criminal tax violations, the report also includes data regarding the Alcohol & Tobacco Tax Division and the Inspection Service.

Mr. Cohen said the board's findings confirmed information previously reported and indicated the extent of IRS cooperation with the subcommittee.

Appearance of nearly 50 IRS officials and agents at public hearings between July 1965 and April 1967 with instructions to testify "fully and frankly" regarding all uses of electronic devices, was considered by IRS officials as a unique record of cooperation by a Federal agency. A large number of other IRS employees were also interviewed by the committee staff.



In summarizing results of the investigation by the special board, Mr. Cohen said the board "attributed the occurrences to (1) misunderstanding of applicable directives and instructions, (2) departures from the Service's normal line management direction and control, and (3) overzealousness on the part of certain personnel engaged in the investigation of the criminal element."

"The board concluded, after examining all the factors surrounding the transgressions that there was no basis for holding individual employees accountable and that the Internal Revenue Service as an institution must bear the blame for what occurred," he said.

Mr. Cohen said he had adopted the board's recommendations—as Senator Long had previously been apprised—of measures to assure that improper use of electronic devices could not recur within the Internal Revenue Service.

"To correct the situation, I issued unmistakably clear and detailed proscriptions on investigative techniques and set forth the Service's policy in drastic and unmistakable terms. Steps have also been taken to bring all facets of our investigative activity under the Service's normal National Office, Regional Office and District Office system of direction and control," Mr. Cohen said.

"Countless conferences and meetings have been held, hammering home the absolute prohibitions on improper use of electronic equipment. Acquisition of and access to, such equipment has been severely restricted. And training in the use of such equipment—even for defensive purposes—has been suspended," he added.

Although a preliminary tabulation of IRS use of electronic devices was completed some time ago, Mr. Cohen withheld a final report to the Long Subcommittee until a "double-check" could be undertaken in recent months to

assure that every single instance, of either legal or improper use was recorded.

It was recalled that during the early stages of the Subcommittee hearings, when each instance of impropriety was reported as soon as it was learned from any of a score of IRS field offices, statements were made that IRS had misrepresented the previous facts.

Recognizing the desirability of full revelation of past improprieties, and the need for prompt remedial action, Mr. Cohen emphasized "the very restrictive measures we have taken" to prevent improper actions in the future.

July 11, 1967
Washington 25, D. C.

Dear Senator Long:

I am pleased to transmit the complete tabulation of all installations of electronic surveillance equipment during the eight-year period beginning July 1, 1958. The Internal Revenue Service played a part in all these installations and no party to the conversation under surveillance had consented to the installations. Enclosed as Exhibit 1 are seventeen tables, with explanations and footnotes, reflecting particular types of installations and specifying the extent to which each of the Service's criminal investigative functions (the Alcohol and Tobacco Tax Division, the Inspection Service and the Intelligence Division) participated in each type of installation. There are further detailed breakdowns designed to provide the Subcommittee with a thorough chronological and geographic picture of the incidence of the subject installations.

As detailed in the Foreword to Exhibit 1, the five categories of tabulated installations were defined in narrative terms so that it would be clear that they did not turn on anyone's subjective evaluation of what was or was not within the law. For example, the first category covers "installations, intercepting phone conversations without the consent of either party" rather than purporting to cover such an ambiguous term as "wiretaps" since, as you are aware, authoritative constructions of the so-called federal "wiretap" statute hold that such interceptions do not *per se* constitute a violation. Similarly, Exhibit 1 refrains from characterizing the other categories of installations as legal or not because the simple fact is that the law is far from settled as to the legality of such installations as pen registers (which do not eavesdrop on conversations and which have been reviewed—adversely—at the court of appeals level only in the Seventh Circuit) or public phone booth installations (which do not eavesdrop on both sides of a conversation and have been reviewed—favorably—at the court of appeals level only in the Ninth Circuit).



In short, we deemed it of more value to the Subcommittee's task of proposing what the law should be to provide information of the Service's past investigative activities instead of intermixing controversial constructions of present law with such information.

The sum of it is that over the eight-year period beginning July 1, 1958, during which the Internal Revenue Service conducted hundreds of thousands of criminal investigations, personnel of the Service participated in: 94 installations, intercepting phone conservations [sic] without the consent of either party; 32 installations, overhearing or recording non-phone conversations without the consent of either party (involving possible intrusion upon a constitutionally protected area); 29 installations, overhearing or recording conversations from public phone booths without the consent of either party; 132 other installations, overhearing or recording conversations without the consent of either party; and 723 pen register installations.

I also transmit, as Exhibit 2, the complete, updated response to the Subcommittee's questionnaire. This, as you know, required exhaustive inquiry from Service criminal investigative personnel and extensive analysis and tabulation in the Service's National Office of data submitted from investigative posts throughout the nation. I particularly invite your attention to the attachments for Exhibit 2 which mirror the severe restrictions now governing Service personnel in the use of electronic surveillance equipment.

Additionally, I am pleased at this time to advise the Subcommittee of the results of the inquiry of the special board convened in July of 1965 to investigate into instances of possible improper uses of electronic surveillance equipment by Service personnel.

The Board's findings confirm the matters developed before the Subcommittee. The board found that Service personnel in fact participated in improper uses of electronic surveillance equipment as stated above, and that such participation peaked in 1963. The board attributed the occurrences to misunderstanding of applicable directives and instructions; departures from the Service's normal line management direction and control; and overzealousness on the part of certain personnel engaged in the investigation of the criminal element. The board found that only two National Office supervisory employees had any knowledge of the proscribed practices. Also, the board found no evidence of improper use of electronic devices for surveillance purposes other than in cases where the individuals were engaged in criminal or illegal activities. The significance of this is that there is no indication of any spill-over to "ordinary audit cases." The board concluded, after examining all the factors surrounding the transgressions, that there is no basis for holding individual employees accountable and



that the Internal Revenue Service as an institution must bear the blame for what occurred.

Based on these findings, the board recommended—and I, as you have been apprised, have adopted—measures to assure that the unique set of circumstances which coincided to produce improper uses of electronic surveillance equipment prior to July of 1965, cannot recur within the Internal Revenue Service.

To correct the situation I issued unmistakably clear and detailed proscriptions on investigative techniques and set forth the Service's policy in drastic and unmistakable terms. Steps have also been taken to bring all facets of our investigative activity under the Service's normal National Office, Regional Office, and District Office system of direction and control. Countless conferences and meetings have been held, hammering home the absolute prohibitions on improper uses of electronic equipment. Acquisition of, and access to, such equipment has been severely restricted. And training in the use of such equipment—even for defensive purposes—has been suspended.

In sum, I am satisfied that those elements which led to improprieties prior to July of 1965 have been abolished. Further, the Service has continued to cooperate with the Department of Justice by referring to that agency information of the kind which is reflected in the Summary Statistics that make up Exhibit No. 1.

The information now furnished to the Subcommittee, supplemented by the vast quantity of information earlier submitted to the Subcommittee in open hearings, staff interviews and correspondence, rounds out the picture of the Service's eavesdropping activities in the past. With all due recognition of the desirability of revelations and remedial actions regarding the past, I must at this moment

turn my attention to the attitudes and activities of Service personnel today and in the future.

In the light of the information already furnished to the Subcommittee and the very restrictive measures we have taken in the area of eavesdropping, it may be that you are presently in a position to make fully informed findings and recommendations regarding the practices and procedures of the Internal Revenue Service. I would also hope that your reports to the Congress and to the people will recognize the very real distinctions between the way the Service operated prior to July of 1965 and the way the Service operates today.

With kind regards,

Sincerely,
Sheldon S. Cohen,
Commissioner

(Enclosures)